

No. 15918

United States
Court of Appeals
for the Ninth Circuit

BANKERS UNION LIFE INSURANCE COM-
PANY, a corporation, Appellant,

vs.

JOHN LYLE MONTGOMERY,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

FILED

APR 18 1958

PAUL P. O'BRIEN, CLERK

No. 15918

United States
Court of Appeals
for the Ninth Circuit

BANKERS UNION LIFE INSURANCE COM-
PANY, a corporation, Appellant,

vs.

JOHN LYLE MONTGOMERY,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Amended Answer	9
Appeal:	
Application to Be Relieved From Printing and Reproducing Certain Exhibits on (USCA)	234
Certificate of Clerk to Transcript of Record on	27
Designations of Record on.....	23, 26, 236
Notice of	21
Order Extending Time to File and Docket Record on	22
Statement of Points on.....	24, 233
Application to Be Relieved From Printing and Reproducing Certain Exhibits (USCA).....	234
Affidavit of James H. Clarke.....	235
Certificate of Clerk to Transcript of Record...	27
Complaint	4

ii.

Designation of Portions of Record on Appeal:

Appellant's (DC)	23
Appellant's (USCA)	236
Appellant's Supplemental (DC).....	26
Interrogatories to the Jury.....	15-17
Judgment	15
Minute Orders:	
Dec. 10, 1957—Order for Judgment, etc.....	14
Dec. 23, 1957—Denying Motions to Set Aside Verdict and Judgment.....	21
Motion to Set Aside Verdict and Judgment....	18
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	21
Order Extending Time to File and Docket Record	22
Petition for Removal.....	3
Exhibit A—Complaint	4
Exhibit B—Summons	7
Pretrial Order	10
Reply to Answer.....	8
Statement of Points to Be Relied Upon (DC)	24
Adoption of (USCA).....	233
Summons	7

Supplemental Designation of Record on Appeal (DC)	26
Transcript of Proceedings and Testimony.....	29
Arguments:	
Mr. Gearin (Closing).....	181, 195
Mr. Davis (Closing).....	187
Mr. Gearin (Opening).....	31
Mr. Davis (Opening).....	35
Charge to the Jury.....	199
Exhibits:	
1—(Defendant's)—Insurance Policy No. 27244-D	221
Admitted in Evidence.....	39
2-A—(Plaintiff's)—Copy of Application Form No. 803, Oct. 14, 1954.....	230
Admitted in Evidence.....	128
3-A—(Defendant's) — Application Form No. 59797, Oct. 13, 1954.....	227
Admitted in Evidence.....	85
Instructions to the Jury.....	199
Witnesses:	
Coen, Dr. Robert A. (Deposition)	
—(Mr. Hilliard)	86
—(Mr. Whitely)	95

Transcript of Proceedings—(Continued):

Witnesses—(Continued):

Cooney, Joseph A.

—(Mr. Gearin)	63
—(Mr. Davis)	66, 78
—(Mr. Gearin)	71, 78

Dickel, Herman

—direct (Mr. Gearin)	39
—direct (Mr. Davis)	42
—cross (Mr. Gearin)	60

Lee, Dr. Louis W. (Deposition)

—Examination	97
—(Mr. Whitely)	108
—(Mr. Hames)	125

McGee, Robert C.

—direct (Mr. Davis)	125
—recalled, direct (Mr. Davis)	144
—cross (Mr. Gearin)	146
—redirect (Mr. Davis)	147
—recross (Mr. Gearin)	148

Montgomery, John L.

—direct (Mr. Gearin)	81
—recalled, direct (Mr. Davis)	148, 171
—cross (Mr. Gearin)	163
—redirect (Mr. Davis)	168
—recross (Mr. Gearin)	169

Transcript of Proceedings in re Defendant's Motions to Set Aside the Verdict and for a New Trial—Denied	209
---	-----

NAMES AND ADDRESSES OF ATTORNEYS

KOERNER, YOUNG, McCOLLOCH &
DEZENDORF,
JOHN GORDON GEARIN,
JAMES H. CLARKE,

Pacific Building,
Portland 4, Oregon,

Attorneys for Appellant.

W. F. WHITELEY,
ALAN F. DAVIS,

1023 Public Service Building,
Portland 4, Oregon,

Attorneys for Appellee.

In the United States District Court
For the District of Oregon

Civil No. 8846

JOHN LYLE MONTGOMERY, Plaintiff,

vs.

BANKERS UNION LIFE INSURANCE COM-
PANY, a corporation, Defendant.

PETITION FOR REMOVAL

Defendant, for the purpose of presenting this petition, shows that heretofore and on or about the 3rd day of October, 1956, plaintiff brought this action against defendant in the Circuit Court of the State of Oregon for the County of Multnomah.

Plaintiff, at the time of the commencement of said action, was and now is a citizen of the State of Oregon, and defendant was and now is a Colorado corporation.

This action is one of a civil nature in which there is now a controversy between citizens of different states, and the amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00.

Attached hereto as Exhibits A and B respectively

are copies of the summons and complaint served upon defendant in said action in said Circuit Court.

KOERNER, YOUNG, McCOLLOCH
& DEZENDORF,

/s/ JOHN GORDON GEARIN,
Attorneys for Defendant.

Duly Verified.

Acknowledgment of Service Attached.

EXHIBIT "A"

In the Circuit Court of the State of Oregon
For the County of Multnomah

No. 234840

JOHN LYLE MONTGOMERY, Plaintiff,

vs.

BANKERS UNION LIFE INSURANCE COM-
PANY, a corporation, Defendant.

COMPLAINT

Comes now Plaintiff and for cause of action against Defendant complains and alleges:

I.

That at all times herein mentioned, the Defendant was and now is a corporation organized and existing under and by virtue of the laws of the State of Colorado and is duly qualified to transact a life insurance business in the State of Oregon.

II.

That on or about the 13th day of October, 1954, the Defendant, in consideration of a premium to it paid by Anna Grace Montgomery, executed and delivered to said Anna Grace Montgomery a policy of life insurance, said policy being in writing and being Policy No. 27244, wherein and whereby it agreed to pay to John Lyle Montgomery, the husband of Anna Grace Montgomery, as beneficiary, the sum of Fifteen Thousand (\$15,000.00) Dollars in the event of the death of Anna Grace Montgomery.

III.

That subsequent to the issuance of said policy and on or about the 27th day of October, 1954, the Defendant executed, issued and delivered to Anna Grace Montgomery, a supplemental agreement attached to and made a part of Policy No. 27244, in which Defendant agreed that in consideration of an additional premium and in the event of accidental death, an additional sum of Fifteen Thousand (\$15,000.00) Dollars, over and above the amount payable hereinbefore alleged, would be paid to John Lyle Montgomery, as beneficiary.

IV.

That thereafter and while said policy and supplemental agreement were in full force and effect and on or about the 20th day of January, 1956, Anna Grace Montgomery died as the result of accidentally falling and striking her head, while vacationing in Puerto Vallarta, Jalisco, United States of Mexico, at the Rosita Hotel.

V.

That thereafter and on or about the 12th day of March 1956, Plaintiff forwarded to the Defendant the Proof of Death form required by the Defendant, together with a copy of the Death Certificate, and has otherwise performed all of the conditions of said policy on his part to be kept and performed.

VI.

That although demand has been made upon the Defendant by the Plaintiff for the payment of said Thirty Thousand (\$30,000.00) Dollars due under the terms and conditions of said policy, Defendant has failed and refused, and now fails and refuses, to pay to the Plaintiff said amount due under the terms and conditions of said policy.

VII.

That more than six months have elapsed since proof of death was given Defendant and it was and is necessary for Plaintiff to employ attorneys to bring this action and the sum of Six Thousand (\$6,000.00) Dollars is a reasonable amount that Defendant should be required to pay as Plaintiff's attorney fees in this cause of action.

Wherefore, Plaintiff prays for judgment against Defendant in the sum of Thirty Thousand (\$30,000.-00) Dollars, with interest thereon at the rate of Six (6%) Percent per annum from January 20, 1956, and for the further sum of Six Thousand (\$6,000.00)

Dollars as Plaintiff's attorney fees and for costs and disbursements incurred herein.

BENSON & DAVIS,
Attorneys for Plaintiff.

EXHIBIT "B"

In the Circuit Court of the State of Oregon
for the County of Multnomah

JOHN LYLE MONTGOMERY, Plaintiff,

vs.

BANKERS UNION LIFE INSURANCE COM-
PANY, a corporation, Defendant.

SUMMONS

To Bankers Union Life Insurance Company, a
corporation, Defendant:

In the Name of the State of Oregon: You are hereby required to appear and answer the Complaint filed against you in the above entitled action within ten days from the date of service of this Summons upon you, if served within this County; or if served within any other County of this State, then within twenty days from the date of the service of this Summons upon you; and if you fail so to answer, for want thereof, the Plaintiff will take judgment against you in the sum of Thirty Thousand (\$30,000.00) Dollars, with interest thereon at the rate of Six (6%) Percent per annum from January 20, 1956, and for the further sum of Six Thou-

sand (\$6,000.00) Dollars as Plaintiff's attorney fees and for costs and disbursements incurred herein.

BENSON & DAVIS,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 10, 1956.

[Title of District Court and Cause.]

REPLY

Comes now Plaintiff and for reply to Defendant's Answer on file herein, admits, denies and alleges as follows:

I.

Denies each and every matter, allegation and thing contained in said Answer, and the whole thereof, except as may be consistent with Plaintiff's complaint on file herein.

Wherefore, having fully replied to Defendant's Answer, Plaintiff prays that same be held for naught, that Defendant take nothing thereby, and that Plaintiff do have and recover judgment against Defendant as originally demanded in Plaintiff's complaint.

W. F. WHITELY,
BENSON & DAVIS,
/s/ By W. F. WHITELY,
Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed Oct. 12, 1956.

[Title of District Court and Cause.]

AMENDED ANSWER

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

Defendant denies each and every, all and singular, the allegations contained in the complaint except it admits:

I.

Defendant admits the allegations of paragraph I of the complaint.

II.

On or about the 27th day of October, 1954, the defendant issued upon the life of Anna Grace Montgomery its policy No. 27244 in the amount of \$15,000.00 with accidental death benefits.

III.

Defendant admits further that Anna Grace Montgomery is alleged to have died in the United States of Mexico, admits that on March 12, 1956 John Lyle Montgomery presented to defendant purported proof of death, admits that defendant has not paid plaintiff as alleged beneficiary, and denies specifically that \$6,000.00, or any lesser amount, is a reasonable amount to be awarded as attorneys' fees to plaintiff.

Third Defense

The policy referred to in the complaint and in

the amended answer hereto was issued solely in reliance upon false statements made by Anna Grace Montgomery and by John Lyle Montgomery and not otherwise.

Prior to the filing of the complaint herein the defendant tendered to plaintiff the premiums paid under the policy of insurance together with interest and rescinded said contract or policy, but said tender and rescission was rejected and refused by the plaintiff. The amount of said tender together with interest to date is hereby deposited in the Registry of this Court for the benefit of the plaintiff.

Wherefore, having fully answered plaintiff's complaint, defendant prays for judgment.

KOERNER, YOUNG, McCOLLOCH
& DEZENDORF,

/s/ JOHN GORDON GEARIN,
Attorneys for Defendant.

Affidavit of Service Attached.

[Endorsed]: Filed Oct. 23, 1956.

[Title of District Court and Cause.]

PRETRIAL ORDER

The above entitled cause came on regularly for pretrial conference before the undersigned judge of the above entitled court on Monday, November 25, 1957. Plaintiff appeared by William F. Whitely and Alan F. Davis, his attorneys. Defendant appeared by John Gordon Gearin, of its attorneys.

Nature of Action

This is an action to recover from a policy of life insurance issued by the defendant upon the life of Anna Grace Montgomery in which plaintiff is designated as beneficiary.

Admitted Facts

I.

Defendant was and now is a corporation organized and existing under and by virtue of the laws of the State of Colorado and is duly qualified to transact business in the State of Oregon.

II.

Prior to the filing of the complaint herein defendant issued its policy No. 27244-D which is attached hereto as Pretrial Exhibit No. 1.

III.

On or about the 20th day of January, 1956, Anna Grace Montgomery died as the result of an accident and thereafter on March 12, 1956 plaintiff submitted to defendant proof of death. Timely demand was made by plaintiff upon defendant for the payment of the amount due on said policy, which demand has been refused by the defendant and no money has been paid to plaintiff by or on behalf of this defendant. Prior to the filing of the complaint herein, defendant notified plaintiff that it rescinded said policy and tendered to plaintiff the amount of the premiums together with interest, but this rescission and tender were rejected and refused by the plaintiff.

Plaintiff's Contentions

I.

Plaintiff contends that by reason of the policy defendant is obligated to pay to the plaintiff the sum of \$30,000.00 together with interest and attorneys' fees in the sum of \$6,000.00.

Defendant's Contentions

I.

Defendant contends that the insurance policy was issued by the defendant solely in reliance upon false statements made by the said Anna Grace Montgomery and the plaintiff and not otherwise. That the representations made by the deceased and/or plaintiff were material, that they were not true and that the policy would not have been issued had the true facts been known.

Each party denies the contentions of the other.

Issues To Be Determined

1. Did the insured, Anna Grace Montgomery, and/or the plaintiff make misrepresentations of fact to the defendant?

2. If so, was such misrepresentation as to material facts?

3. Was the policy issued by the defendant in reliance upon said statements?

4. What is the amount of attorneys' fees to which the plaintiff is entitled to recover?

Physical Exhibits

Certain physical exhibits have been identified and

received as pretrial exhibits, the parties agreeing, with the approval of the court, that no further identification of exhibits is necessary. In the event that said exhibits, or any thereof, should be offered in evidence at the time of trial, said exhibits are to be subject to objection only on the grounds of relevancy, competency and materiality.

Exhibits

1. Policy No. 27244-D.
2. Deposition of Dr. Lewis W. Lee.
3. Deposition of Dr. Montgomery (and exhibits).
4. Deposition of Dr. Cooney (and exhibits).
5. Deposition of Dr. Coen (and exhibits).
6. Hospital Records:
 - (a) Holladay Park Hospital
 - (b) Portland Osteopathic Hospital

The parties hereto agree to the foregoing pretrial order and the court being fully advised in the premises,

Now Orders that the foregoing pretrial order shall not be amended except by consent of both parties, or to prevent manifest injustice; and it is further

Ordered that the pretrial order supersedes all pleadings; and it is further

Ordered that upon trial of this cause no proof shall be required as to matters of fact, hereinabove specifically found to be admitted, but that proof upon the issues of fact (and law) between plaintiff and defendant as hereinabove stated shall be had.

Dated at Portland, Oregon, this 9th day of December, 1957.

/s/ GUS J. SOLOMON,
United States District Judge.

Approved:

/s/ W. F. WHITELEY,
Of Attorneys for Plaintiff.

/s/ JOHN GORDON GEARIN,
Of Attorneys for Defendant.

[Endorsed]: Filed Dec. 9, 1957.

[Note: Interrogatories to the Jury are included in the Judgment set out at pages 16-17 of this printed record.]

[Title of District Court and Cause.]

MINUTE ORDER

November, 1957 Term. Tuesday, Dec. 10, 1957.
Solomon, Judge, Reporter: G. G., Deputy: Davis.

Record of further jury trial; arguments of counsel; court instructs jury and jury retires for deliberations at 11:30 a.m. approx. Order for jury meals.

Jury returns with answers to special interrogatories at 3:10 p.m. Jury polled: all affirming. Order to enter judgment for plaintiff for \$30,000 on the special interrogatories. Order to file interrogatories.

Order allowing plaintiff sum of \$5000 as attorneys' fees.

In the United States District Court
for the District of Oregon

Civil No. 8846

JOHN LYLE MONTGOMERY, Plaintiff,

vs.

BANKERS UNION LIFE INSURANCE COM-
PANY, a corporation, Defendant.

JUDGMENT

The above-entitled action came on duly and regularly for trial on the 9th day of December, 1957, before the Honorable Gus J. Solomon, Judge of the above-entitled Court, the Plaintiff appearing in person and by his attorneys, W. F. Whitely and Alan F. Davis, and the Defendant appearing by and through one of its attorneys, John Gordon Gearin; and the jury having been duly and regularly empaneled and sworn to try said case, did hear evidence on behalf of the Plaintiff and the Defendant and arguments of counsel, and the Court duly instructed the jury and submitted to the jury written interrogatories, and the jury did thereafter retire to consider its verdict and returned into Court on the 10th day of December, 1957, its written interrogatories, which interrogatories, after setting forth the title of this Court and the cause, read as follows:

“We, the jury, make the following answers to the special interrogatories submitted to us relative to

the application filed by Anna Grace Montgomery with the Bankers Union Life Insurance Company:

1.

'27. Have you had or have you ever been told you have or have you ever been treated for:

'(e) Epilepsy, mental derangement, nervous prostration, syphilis, paralysis, convulsions, fainting spells? No.'

(a) Was such answer wilfully false? () Yes.
(x) No.

(b) Was such answer material? (x) Yes () No.

(c) Did the defendant rely on it? (x) Yes () No.

2.

'28. Name below all causes for which you have consulted a physician or healer in the last ten years; give details: (Include also particulars of any 'Yes' answer to Question 27.)

'Disease or injury (If none, state 'None')

Nervousness. Date: 2 yrs. ago. Duration: About 2 mos.

Complications: None. Was Operation Performed .

Results: Excellent. Name and address of attending physician or healer: Joseph Cooney.

Disease or injury: Suspension (Uterus). Date: 3 yrs.

Duration: . Complications: None. Was Operation Performed: . Results: Excellent.

Name and address of attending physician or healer: Dr. Ira Neher.'

(a) Was such answer wilfully false? () Yes.
(x) No.

(b) Was such answer material? (x) Yes. () No.

(c) Did defendant rely on it? (x) Yes. () No.

3.

'29. Have you ever had or been advised to have a surgical operation or have you ever consulted any physician for any ailment, not included in any of the above answers? (If yes, give full particulars)?
(x) No.'

(a) Was such answer false? () Yes. (x) No.

(b) Was such answer wilfully false? () Yes.
(x) No.

(c) Was such answer material? (x) Yes. () No.

(d) Did the defendant rely on it? (x) Yes. () No.

4.

'33. Are there any additional facts or special circumstances known to you which might affect the risk of insurance on your life, and of which the Company should be advised? (If none, please state 'None') None'

(a) Was such answer wilfully false? () Yes.
(x) No.

(b) Was such answer material? (x) Yes. () No.

(c) Did the defendant rely on it? (x) Yes. () No.

Dated this 10th day of December, 1957.

/s/ FLORENCE BERRY,

Foreman.'

The Court thereupon polled the jury and received the interrogatories as the verdict of the jury in this case and ordered the same filed and the jury was

discharged from further consideration of the case.

Based upon the foregoing proceedings and the written interrogatories,

It Is Considered, Ordered and Adjudged that Plaintiff take, have and recover of and from the Defendant judgment in the sum of Thirty Thousand (\$30,000.00) Dollars, with interest thereon at 6% per annum from March 12, 1956, until paid; and

It Is Further Considered, Ordered and Adjudged that Plaintiff, pursuant to stipulation of the parties that the Court determine the amount of attorneys fees to be allowed herein, have the sum of Five Thousand (\$5,000.00) Dollars as and for attorneys fees; and

It Is Further Considered, Ordered and Adjudged that the sum of \$59.75 be allowed for Plaintiff's costs and disbursements incurred herein.

Dated at Portland, Oregon, this 10th day of December, 1957.

/s/ GUS J. SOLOMON,
Judge.

[Endorsed]: Filed Dec. 11, 1957.

[Title of District Court and Cause.]

MOTION

Defendant, pursuant to the provisions of Rule 50, moves the court to have the special verdict, i.e., the interrogatories, of the jury set aside and the judgment based thereon in favor of plaintiff and against defendant in the sum of \$30,000.00 and the

further sum of \$5,000.00 likewise set aside, and have judgment entered in accordance with its motion for directed verdict interposed at the close of all the evidence in this cause on Monday, December 9, 1957.

Defendant will contend that its motion for directed verdict was not granted when under the fact and law it should have been granted, as there was no genuine issue as to any material fact, and that defendant was entitled to judgment in its favor as a matter of law.

In the alternative, defendant, pursuant to the provisions of Rule 59, moves the court for an order setting aside the special verdict of the jury, i.e., the interrogatories, and the judgment based thereon, and granting to the defendant a new trial.

The grounds of this motion are that the verdict was contrary to the law and was not sustained by the evidence, it being manifestly against the weight of the evidence, i.e., the evidence affirmatively disclosed that the plaintiff and the deceased, Anna Grace Montgomery, withheld vital and important information relating to the physical and mental condition of the deceased, and failed to make true answers to the questions propounded in the application for insurance.

Defendant further contends, in support of its motion for new trial, that the special verdict, i.e., the interrogatories, of the jury were inconsistent and are insufficient to support a judgment in favor of plaintiff and against defendant. More specifically, defendant will contend that the jury found

that the answers made by the applicant and the plaintiff were not wilfully false when, at the same time, found that the answers were material and that the defendant relied upon them in issuing the policy.

As a further ground in support of its motion for new trial, defendant will contend that the court committed error in one or more of the following particulars:

1. The court permitted Dr. McGee to testify over the objection of the defendant, that he knew from his social contacts with the Montgomery family and his professional acquaintance with Dr. Montgomery that the deceased had been confined to Holladay Park Hospital. This testimony was highly prejudicial to the defendant, particularly since plaintiff made no claim of waiver or estoppel, nor did plaintiff claim that this knowledge was imputed to the defendant. Furthermore, such testimony was immaterial to any issue raised by the pretrial order because as a matter of law, regardless of any position that may or may not have been taken by plaintiff, the knowledge of an insurer's agent acquired outside the scope of his agency is not imputable to the principal.

2. The court erred in permitting, over the objection of the defendant, Dr. Dickel to testify as to the answers which he, as a psychiatrist, would have given to the questions contained in the application. This evidence was immaterial to any issue in the case and was highly prejudicial to the defendant.

3. The court erred in rejecting defendant's offer into evidence of the office records of Dr. Robert A. Coan, which records were identified by Dr. Dickel and were used by him as a basis for his testifying in this case.

KOERNER, YOUNG, McCOLLOCH
& DEZENDORF,
/s/ JOHN GORDON GEARIN,
Attorneys for Defendant.

I, John Gordon Gearin, one of attorneys for defendant, hereby certify that the foregoing Motion is made in good faith and not for the purpose of delay.

/s/ JOHN GORDON GEARIN.

Acknowledgment of Service Attached.

[Endorsed]: Filed Dec. 13, 1957.

[Title of District Court and Cause.]

MINUTE ORDER

Nov. 1957 Term. Monday, Dec. 23, 1957. Solomon, Judge. Reporter: DT. Deputy: Davis.

Record of hearing on defendant's motion to set aside verdict and judgment. Order denying both motions.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that defendant Bankers Union Life Insurance Company appeals to the

United States Court of Appeals for the Ninth Circuit from each and every part of the final judgment entered in this action on December 10, 1957 and the whole thereof.

The time for filing this notice of appeal was extended under Rule 73(a) FRCP to January 22, 1958, being thirty (30) days following entry by the Court on December 23, 1957, of an order denying appellant's timely motions for judgment n.o.v., or, in the alternative, for a new trial under Rules 50 and 59 FRCP.

Dated this 7th day of January, 1957.

KOERNER, YOUNG, McCOLLOCH
& DEZENDORF,

/s/ JOHN GORDON GEARIN,

/s/ JAMES H. CLARKE,

Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed Jan. 8, 1958.

[Title of District Court and Cause.]

ORDER

For good cause shown the Court hereby extends for sixty (60) days from and after January 8, 1958 the time within which to serve and file defendant's statement of points to be relied on and within which (1) to file the reporter's transcript of the evidence and proceedings included in its designation; (2) to file the record on appeal; and (3) to docket the appeal herein. This order is made before

the expiration of the period originally prescribed for the same.

Dated at Portland, Oregon, this 8th day of January, 1958.

/s/ GUS J. SOLOMON,
United States District Judge.

[Endorsed]: Filed Jan. 8, 1958.

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF THE RECORD TO BE CONTAINED IN THE RECORD ON APPEAL

Appellant designates the following portions of the record, proceedings, and evidence to be contained in the record on appeal:

1. Petition for Removal;
2. Exhibit A—Complaint;
3. Exhibit B—Summons;
4. Amended Answer;
5. Reply;
6. Pretrial Order;
7. Verdict and Interrogatories to Jury and Direction for Entry of Judgment;
8. Judgment;
9. Judgment Order;
10. Motion for Judgment n.o.v.;
11. Order Denying Motion for Judgment n.o.v.;
12. Reporter's transcript of all of the Evidence and all of the Proceedings had at the trial;

13. All exhibits offered and received in evidence;
14. All exhibits offered but not received in evidence;
15. Notice of Appeal;
16. Statement of Points to be Relied Upon;
17. This Designation;
18. All orders extending the time within which to file the record on appeal and docket the appeal.

KOERNER, YOUNG, McCOLLOCH
& DEZENDORF,

/s/ JOHN GORDON GEARIN,

/s/ JAMES H. CLARKE,

Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed Jan. 8, 1958.

[Title of District Court and Cause.]

POINTS ON WHICH APPELLANT
INTENDS TO RELY

On the appeal in this action, appellant will rely on the following points:

1. The trial court erred in denying appellant's motion for a directed verdict. The evidence was conclusive and undisputed that:

a) the application for the policy of life insurance which is the subject of this action, which application was submitted to appellant by the deceased insured and attached to said policy, contained wilfully false answers to questions contained therein;

b) said answers were material to the risk assumed by appellant;

c) appellant relied upon said answers in issuing said policy.

2. The trial court erred in ordering entry of judgment based on the answers of the jury to special interrogatories submitted to them by the Court, because there was no evidence to support the findings therein that the answers to questions contained in the said application for life insurance to which the interrogatories referred were not wilfully false, and the evidence was conclusive and undisputed that they were wilfully false.

3. The trial court erred in failing to allow appellant's motion to set aside the special verdict of the jury and the judgment based thereon and for entry of judgment for appellant, or, in the alternative, granting appellant a new trial.

4. The trial court erred in permitting Dr. Herman Dickel, a psychiatrist, to testify, over appellant's objection, to the manner in which he would have answered the said questions contained in the said application for life insurance assuming that he, having himself had the history, diagnosis and treatment of the deceased insured, had filled it out on his own behalf. The wilful falseness of the said answers in the application for life insurance submitted to appellant by the deceased insured was an issue in the case.

5. The trial court erred in failing, upon the request of appellant, to mark the office records of Dr. Robert A. Coan, as exhibits in the case, and

thereafter, upon the offer of appellant, to admit the same in evidence.

6. The trial court erred in permitting Dr. Robert C. McGee to testify, over appellant's objection, that he knew from his social contacts with appellee's family and his professional acquaintance with appellee that the deceased had been confined to Holladay Park Hospital prior to execution of the said application for life insurance. Appellee made no claim of waiver or estoppel, nor did he claim that the knowledge of Dr. McGee was or should be imputed to appellant; the testimony was immaterial to any issue raised or presented by the pre-trial order.

KOERNER, YOUNG, McCOLLOCH
& DEZENDORF,

/s/ JOHN GORDON GEARIN,

/s/ JAMES H. CLARKE,

Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed Feb. 24, 1958.

[Title of District Court and Cause.]

SUPPLEMENTAL DESIGNATION OF PORTIONS OF THE RECORD TO BE CONTAINED IN THE RECORD ON APPEAL

Appellant designates the following portions of the record, proceedings, and evidence to be contained in the record on appeal in addition to the

portions thereof contained in its original designation:

19. Order denying motion for directed verdict;
20. This supplemental designation.

KOERNER, YOUNG, McCOLLOCH
& DEZENDORF,
/s/ JOHN GORDON GEARIN,
/s/ JAMES H. CLARKE,
Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed Feb. 24, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Petition for removal; Reply; Amended answer; Pre-trial order; Interrogatories; Order to enter judgment; Judgment; Motion of defendant to have verdict, interrogatories and judgment set aside, etc.; Record of hearing on defendant's motion to set aside verdict and judgment, etc.; Notice of appeal; Supersedeas bond; Order extending time to docket appeal; Designation of portions of record to be contained in record on appeal; Order for transmit-

tal of exhibits to Court of Appeals; Points on which appellant intends to rely; Supplemental designation of portions of record to be contained in record on appeal and Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 8846 in which Bankers Union Life Insurance Company, a corporation is the defendant and appellant and John Lyle Montgomery is the plaintiff and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this Court.

I further certify that there is enclosed herewith the reporter's transcript of testimony and proceedings and the transcript of proceedings in re: Defendant's motions to set aside verdict and for a new trial. Under separate cover we are forwarding exhibits Nos. 1; 2; 2-A; 3; 3-A; 4; 5; 6-A and 6-B.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 4th day of March, 1958.

[Seal] R. DeMOTT,
 Clerk,

/s/ By THORA LUND,
 Deputy.

United States District Court,
District of Oregon

Civil No. 8846

JOHN LYLE MONTGOMERY, Plaintiff,

vs.

BANKERS UNION LIFE INSURANCE COM-
PANY, a corporation, Defendant.

TRANSCRIPT OF PROCEEDINGS

Portland, Oregon, December 9, 1957
9 A.M.

Before: Honorable Gus J. Solomon, District
Judge, with a Jury.

Appearances: Messrs. William F. Whitely and
Alan F. Davis, Attorneys for Plaintiff; Mr. John
Gordon Gearin, of Attorneys for Defendant.

Court Reporter: Gordon R. Griffiths. [1*]

(A jury having been duly empaneled and
sworn to try the above-entitled cause and hav-
ing retired to the jury room, the following pro-
ceedings were had out of the presence of the
jury:)

Mr. Gearin: Your Honor, an interesting ques-
tion has come up. In view of the issues in the
case, wouldn't the defendant go first?

* Page numbers appearing at top of page of Reporter's Tran-
script of Record.

The Court: Yes.

Mr. Gearin: Who would close? We have the burden of proof on our affirmative matters, and we admit the policy.

The Court: You will go first. You will open, and you will close because you have the burden of proof.

Mr. Davis: You mean we do not have the closing argument, your Honor?

The Court: No, you would not because you do not have the opening. He admitted in the pretrial order the issuance of the policy, and he has the burden.

Mr. Davis: I think that is true as far as the evidence is concerned, but I feel we would have the right to opening and closing argument.

The Court: I do not think so. We have had that up before. You will go first, Mr. Gearin, and I shall tell [2] the jury that you have the burden of proof.

(Thereupon, the jury returned to the jury box and the following proceedings were had in open court:)

The Court: What have you decided on attorneys' fees?

Mr. Davis: We will leave it up to the Court.

Mr. Gearin: I think, your Honor, we would be entitled to have the matter passed on by the trier of the facts.

The Court: Do you want the jury to try it?

Mr. Gearin: Yes, sir.

The Court: Then he will go first because he has the burden on that.

Mr. Gearin: I will submit to the Court.

The Court: Ladies and gentlemen, as I explained to you previously, the company admits it issued the policy; therefore, the case will be determined on the defenses of the company. That being the case, the company has the burden of proof, and even though they are the defendant they will go forward with the first opening statement, and they will put on their evidence first also. Proceed.

Mr. Gearin: If the Court please, ladies and gentlemen, the issues in this case I think are rather short.

In October of 1954 the company, in response to a written application which was executed by Mrs. Anna Grace Montgomery and by the plaintiff, Dr. Montgomery, issued a [3] policy of life insurance which provides a payment of \$15,000 on her death while it was in effect, and an additional sum if the death was accidental. Within a two year period following the execution of the policy, Mrs. Montgomery died an accidental death. Subsequent thereto, the plaintiff made proof of loss.

Upon inquiry into the facts surrounding the matter, the company declined to pay and rescinded the contract and offered to pay back the amount of the premiums to the plaintiff. That was not accepted, and the amount of the premiums, after this case was filed, together with interest, was tendered into the registry of this court.

The question then before the Court is whether or not the deceased, that is, the insured, Mrs. Montgomery, made misleading or false statements in the application that was made. In this case the application was completed by the plaintiff, that is Dr. Montgomery, with his wife. They were by themselves and they sat, the testimony will be, and went over the questions and answers, the printed questions and answers in the application.

Now, it developed, and I think without any controversy, these facts. In 1951 Mrs. Montgomery had been indisposed for a period of time. Her condition became progressively worse, and at that time she was taken by an ambulance, in the company of Dr. Montgomery, to [4] Holladay Park Hospital which I think will be described as a psychiatric hospital. She was there for a period of a few days. She came back home, and late, I believe this was in March, in April of that year she went there for a prolonged period of time. She was given electric shock treatments, some five, I believe, in number, which the doctor will explain to you is something that is rather severe. An electric shock is put through electrodes from one side of the head to another with such intensity and with such voltage that it produces unconsciousness and convulsions in the person, a person taking the treatments. Dr. Montgomery, the plaintiff in this case, gave his written consent to those electric shock treatments because the hospital will not do it unless they have the consent of all concerned.

She was treated at that time by several—I think

a neurosurgeon or neurologist consulted with her. She was treated by a psychiatrist, a Dr. Robert Coen. His deposition has been taken. His testimony will be here.

As shown by the hospital records that we will have in the case, Mrs. Montgomery's condition was diagnosed as that of a schizophrenic paranoid which is a form of serious and severe mental illness. Those facts are here without dispute, and the testimony likewise, we submit, will appear without dispute by the medical director of [5] the company that had the company been advised that Mrs. Montgomery was suffering from this mental illness, schizophrenia, paranoid—I think that is the way the doctors, the psychiatrists, have of describing it—the policy would not have been issued.

We feel that we were not advised to the facts, and the truth of the matter was concealed from us because in the application which you people will have with you when the case is submitted you will find these questions and answers. They asked the applicant to name all the causes for which, "You have consulted a physician or healer in the last ten years." You remember the date, as it will show, was in 1954. Three years previously she was in the hospital as we have described. The answers made by the deceased, by the plaintiff in this, Dr. Montgomery, was that about two years prior thereto she had been treated for nervousness for about two months and that she had a uterine suspension. Dr. Joseph Cooney whose name was mentioned, also Dr. Ira Neher, they were also asked this ques-

tion: "Have you ever been treated for mental derangement?" The answer was No. "Have you ever been treated for nervous prostration," and the answer is No.

The evidence will show that the application was prepared, again I repeat, by the applicant—that is Mrs. Montgomery—and by the plaintiff, the doctor here. [6] Then again, in the application which was executed in the manner that I have described was: "Have you ever consulted with any physician for any ailment, not included in any of the above answers?" To which the answer was No.

We feel then that the condition as we know it of schizophrenia, paranoid when the lady was treated by a psychiatrist, was withheld from the company, both the nature of the mental illness and the fact that she had been treated by Dr. Coen, a psychiatrist, and I believe other doctors were called in consultation. She was also seen by another psychiatrist, I believe by a Dr. Herman Dickel, who is in the courtroom. I think he will be able to testify on that subject sometime along the course of the trial.

We ask that you keep an open mind until everything is in including evidence on both sides of the case. I think the evidence will satisfy you, members of the jury, that this was a serious mental illness, but it was concealed from the company and that the company would not have issued the policy had the true facts been known. Thank you.

The Court: Mr. Davis.

Mr. Davis: If your Honor please, Mr. Gearin, ladies and gentlemen of the jury. The evidence briefly will show that Dr. Montgomery and his wife, basically Dr. Montgomery was contacted by an insurance man with the Bankers Life Insurance Company with regard to taking out a life insurance [7] policy. They had discussed the policy, and the policy basically was to be taken out by Dr. Montgomery for the sum of \$30,000. The agent in working it out had mentioned to him about that the premium would be less if they split it equally, if Dr. Montgomery would take \$15,000 and Mrs. Montgomery would take \$15,000. Then about two weeks later what would be called an additional for accidental injuries was included, or accidental injuries was included, or accidental death, an additional \$15,000 on each of their policies. Now, the application form was left by the agent for Dr. and Mrs. Montgomery to fill out, and it was taken home. It was filled out. Dr. Montgomery filled it out, and Mrs. Montgomery assisted, and both of them filled it out together. I think the testimony will show that parts of this are in Dr. Montgomery's writing and part in hers, but she signed it. In this application form, as Mr. Gearin told you, there are three different questions. One of them in this application form, the one that is of particular interest is this, and it is very small writing, and I am going to read it to you anyway:

“Have you had or have you ever been told you had or have you ever been treated for:

‘Epilepsy, mental derangement, nervous prostra-

tion, syphilis, paralysis, convulsions, fainting spells? ”

Now, under “nervous prostration” you will find [8] from the evidence that there is a line drawn where they have drawn a line under nervous prostration, and after that they put the word “No.” Down below they have put “Nervousness—2 yrs. ago, about 2 mos. duration; Complications, none.” Then it asks for attending physician or healer: Dr. Joseph Cooney. The name was put down what he was attending physician for, Mrs. Montgomery and for their children.

Now, apparently, you have to be examined by a doctor when you are taking out a life insurance policy, and one of the names listed with the insurance company was Dr. McGee out at Hillsboro. Dr. McGee will be here to testify. He was the examiner of Mrs. Montgomery for this policy, and in that application—that is filled out by the doctor and sent to the company. Mrs. Montgomery apparently—well, you have been examined, they ask you questions, the doctor fills it in, and it is sent out.

The insurance company contends that Dr. and Mrs. Montgomery deliberately or falsely misrepresented and kept something from them. Dr. Dickel will testify, Dr. Dickel on behalf of the plaintiff, Dr. Montgomery. Dr. Dickel was one of the doctors called in this case, Dr. Coen, Dr. Dixon. Dr. Coen is not here. He is, I believe, in Kansas, if I am not mistaken, or in San Francisco.

There are two questions, mental derangement or [9] nervous prostration. That has been underlined.

It has been put in the application form. Dr. McGee will testify that he put it and wrote it in.

Mr. Gearin: Just a moment, your Honor, we object. This is not within the scope of the issues of the pretrial order. It is confined solely to that application that has been executed by the plaintiff and her husband in this case.

The Court: I am going to rule against you on that because that is the contention you made earlier, and I just read your contention, and it does not say that. You do not specifically limit it to the portion which she herself prepared. You were relying, as it says, "Defendant contends that the insurance policy was issued by the defendant solely in reliance upon false statements made by the said Anna Grace Montgomery and the plaintiff and not otherwise. That the representations made by the deceased and/or plaintiff were material, that they were not true and that the policy would not have been issued had the true facts been known." That is your complete statement.

Mr. Gearin: Yes, sir.

The Court: Go ahead.

Mr. Davis: This form the doctor filled in was sent back to the company. Now, the sole question, and I don't want to take up a great deal of time with you, ladies and gentlemen, but the doctors will testify, and the sole question [10] is this: Did Dr. Montgomery and did Mrs. Montgomery make false statements in order to get this policy. Did they conceal something with regard to this to keep the insurance company from giving that application to

them. I am not going to go into the medical testimony because you will hear the doctors and, as Mr. Gearin told you, keep an open mind until you have heard all of the evidence and Judge Solomon's instructions, and then bring in a fair verdict. That is all we can ask you to do.

I do want to point out this to you. One of the contentions was that Dr. Coen's name was never mentioned; Dr. Dickel's or Dr. Dixon's name was never mentioned, and in going through these exhibits when you examine them, here it says name and address of the attending physician and healer. Now, based upon that, the attending physician was Dr. Joseph Cooney. He is not a member—Dr. Joseph Cooney is an osteopath. Dr. Montgomery is a radiologist at the Portland Osteopathic Hospital. Dr. Cooney was not a member or on the staff of the hospital over at Holladay Park, and the records will show that Dr. Cooney as the attending physician called in Dr. Coen, Dr. Dickel, and Dr. Dixon as consultants to take care of her. He was not on the staff, and after this case is completely over, ladies and gentlemen, I want you to just consider one thing: Was there any element to keep this insurance company [11] (if there is any question about it) from finding out about this situation? That is all we want you to consider: Was this done falsely; was it done deliberately to mislead this insurance company. That is the whole question.

Mr. Gearin: We will offer into evidence, your Honor, Exhibit No. 1, the policy.

The Court: Received.

(Insurance policy previously marked Defendant's Exhibit 1 for identification was thereupon received in evidence.)

[See page 221.]

Mr. Gearin: May it be understood, your Honor, with regard to the written exhibits that are introduced that have been identified in the pretrial order that we may at any time refer to any part?

The Court: Yes, at any time. You do not have to read them to the jury at the time they are introduced. You can refer to them for the first time in the argument.

Mr. Gearin: May we ask then that there be received in evidence Exhibit No. 6-A, the record of Holladay Park Hospital.

The Court: All right, received.

(Document, record of Holladay Park Hospital, Anna Grace Montgomery, [12] previously marked Defendant's Exhibit 6-A for identification, was thereupon received in evidence.) [13]

HERMAN DICKEL

a witness produced in behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Gearin): Your name is Dr. Herman Dickel? A. It is.

Q. You are a psychiatrist, doctor?

A. I am.

Q. Are you regularly licensed to practice your

(Testimony of Herman Dickel.)

profession in this vicinity? A. I am.

Q. You are on the staffs of what hospitals?

A. Holladay Park Hospital, Emanuel, St. Vincent's and Good Samaritan.

Q. Do you restrict your work to the field of psychiatry? A. I do.

Q. Were you on the staff of Holladay Park Hospital in 1951? A. Yes, I was, sir.

Q. Doctor, is Holladay Park Hospital any particular kind of a hospital? Is it a psychiatric hospital or medical hospital, orthopedic hospital?

A. I think in this state it is licensed as a general hospital.

Q. What is the general work that they do? The bulk of [14] their work at the hospital is what, Doctor?

A. Oh, everything from medicine, surgery, obstetrics, gynecological things and psychiatric things. The second floor is restricted to psychiatric treatment problems, but the hospital as a whole is a general hospital.

Q. Doctor, in 1951, did you have——

The Court: I think probably you ought to find out and ask Dr. Dickel what is a psychiatrist.

Q. (By Mr. Gearin): What is a psychiatrist, Doctor?

A. A psychiatrist is a licensed physician and surgeon limiting his practice entirely to the treatment of those diseases which are more or less a part of the functioning of the central nervous system.

(Testimony of Herman Dickel.)

Q. Does that include mental derangement?

A. It might under certain circumstances.

Q. Doctor, in the spring of 1951, did you have occasion to treat Anna Grace Montgomery?

A. I would have to explain that in this manner. In 1951 the offices of Drs. Dixon, Dickel and Coen contained three of us as partners, and it was customary where any one of the three of us having cases in the hospital for the other two to occasionally look in and see or help out in such matters as were necessary. Actually, in this particular instance, Mrs. Montgomery was a case referred to Dr. Coen for consultation, advice and/or treatment, and on two [15] occasions, and only two occasions, when Dr. Coen was out of town and I made rounds at the hospital was it necessary for me to give any orders to the nurses in regard to her behalf. She was not actually under my care. She was under Dr. Coen's care.

Q. Doctor, when you saw her, was she confined to any hospital?

A. She was confined in Holladay Park Hospital.

Q. What floor of Holladay Park Hospital?

A. On the second floor.

Q. Was she a psychiatric patient?

A. Under the ordinary definition of the word, yes.

Q. Who was her attending physician at that time? A. Dr. Cooney, I think.

(Testimony of Herman Dickel.)

Q. Who was in charge of her care and treatment in Holladay Park Hospital?

A. Dr. Robert A. Coen, (spelling) C-o-e-n.

Q. What was his profession or calling at that time?

A. Dr. Coen was a licensed physician limiting his practice to psychiatry.

Q. Did you have occasion to see Mrs. Anna Grace Montgomery to such an extent that you could advise as to what her physical or mental condition was at the time she was confined in Holladay Park Hospital?

A. No, I did not.

Mr. Gearin: No further questions, Doctor. [16]

Examination

Q. (By Mr. Davis): Dr. Dickel, where did you get your education, Doctor?

A. I graduated from the University of Montana from college, got my medical training at Northwestern University in Chicago. I interned at St. Vincent's Hospital in Portland and got my special training in psychiatry at the University of Oregon Medical School, the State Hospital System in Nebraska, and Johns Hopkins University of Baltimore.

Q. How long have you been licensed in Oregon to practice your specialty, Doctor?

A. I have been licensed as a physician and surgeon since 1938.

The Court: Is this cross-examination?

Mr. Davis: Well, your Honor, allow me to say

(Testimony of Herman Dickel.)

this. I am going to ask Dr. Dickel to be my own witness in this matter, and I don't know as the Court will want me to have him come back or accomplish it at this time.

Mr. Gearin: I do not have any objection to his going outside of the realm of direct examination, your Honor.

The Court: All right, there is no question about Dr. Dickel's qualifications as a psychiatrist. That has been proved already.

Q. (By Mr. Davis): Dr. Dickel, in the field of psychiatry [17] it includes, as I believe you said, a number of things. Is that correct? A. Yes.

Q. Did you make any type of examinations of Mrs. Montgomery at the hospital or just visited with her?

A. So far as the records show it, and I have to depend entirely on the records, I only saw her very briefly on two occasions in order to help the nurses because Dr. Coen was out of town on those particular days. I do not recall doing any examination or any thorough study of her.

Q. The record that you have, Doctor, does that—is that Dr. Coen's record?

A. The records I have here are the records that were in our office and were left in our office by Dr. Coen when he left the city.

Q. In other words, is that, to your knowledge, a record of Dr. Coen's examination?

A. That's right, sir.

(Testimony of Herman Dickel.)

Q. You are familiar with that, aren't you, Doctor? A. I am.

Q. The three of you, Dr. Dixon, yourself, and Dr. Coen, acted together to do different work. Even though that patient may be under the supervision of one doctor, all three of you at that time would work with that patient, wouldn't you? [18]

A. At that time that is the way that we functioned, yes.

Q. Dr. Dickel, would you explain—as I understand, you mentioned Dr. Cooney was the attending physician; is that correct? Do your records show that?

A. That is what Dr. Coen has here, yes.

Q. As the attending physician? A. Yes.

Q. I believe you referred that Dr. Coen then would be a consultant?

A. He was called in for consultation, for examination, and for any treatment that seemed necessary so far as her psychiatric problems were concerned.

Q. At the Holladay Park Hospital Dr. Cooney was not on the staff? A. No, he was not.

Q. You knew that he was an osteopath?

A. Yes.

Mr. Davis: Your Honor, I wonder if the application form signed by Mrs. Anna Grace Montgomery, I believe that is an exhibit connected—it is the large form.

Mr. Gearin: It is the exhibit attached to the

(Testimony of Herman Dickel.)

deposition of Dr. Montgomery which is pretrial Exhibit No. 3.

The Court: It is not here. Dr. Montgomery, I have [19] his deposition, but it is not here.

Mr. Gearin: There it is, your Honor. That is it.

The Court: This is Dr. Lee. This is Pretrial Exhibit No. 1.

(Discussion between Court and counsel.)

Mr. Davis: This is right, your Honor. This is the one. May I have Dr. Dickel examine that?

(Document presented to the witness.)

Q. (By Mr. Davis): Dr. Dickel, you are holding an application form for the Bankers Union Life Insurance Company which was signed by Mrs. Montgomery, and I refer you to question 27: "Have you had or have you ever been told you had or have you ever been treated for"—do you see that, Doctor? A. Yes.

Q. Now, I refer you to (e), I believe it is, "Epilepsy, mental derangement, nervous prostration, syphilis, paralysis, convulsions, fainting spells," all in that one (e). Now, Doctor, based upon the records that you have of Dr. Coen and based upon your knowledge of the case from the time that you knew about Mrs. Montgomery, could you advise the Court and jury, in your opinion, what, if any, of those should have been marked or underlined or answered to the affirmative?

Mr. Gearin: Objection, your Honor, on the grounds and for the reason that Dr. Dickel has told

(Testimony of Herman Dickel.)

us that he [20] cannot testify as to her mental and physical condition. The plaintiff has asked him to testify from the records, and the records are not in evidence.

The Court: What records?

Mr. Gearin: I do not think it is proper to ask a witness who has not sufficient knowledge of the deceased's mental or physical condition to give his opinion on it to say what answer should have been given when he does not have personal knowledge because he has been asked to testify from Dr. Coen's records. I would like to see Dr. Coen's records, those from which the doctor has been testifying, and I may want to offer them in evidence. Then, in that event, they would speak for themselves.

The Court: Yes, the jury is entitled to know the evidence upon which the doctor makes the determination. Do you desire to have the records in the office of Dr. Dickel made available and have the doctor testify on the basis of those records?

Mr. Davis: Now, if your Honor please, you have your records with you, haven't you, Doctor?

The Witness: Yes, I do.

Mr. Davis: I asked you to bring those. Is it necessary to refresh your memory from the records, or have you gone through your records in order that you can give an answer to the question? [21]

The Witness: I think I could give an answer to the question that you asked without referring further to the records.

(Testimony of Herman Dickel.)

The Court: That would not make any difference. I do not know where you get—you might have gotten it from the elevator boy or someone. I think we are entitled to know where you got your information about which you testify. If he is going to use the records, they should be in evidence, and if he is not going to use the records, then I do not see that he has any information upon which to base a judgment.

Q. (By Mr. Davis): Dr. Dickel, did you testify that these are records that you and Dr. Coen and Dr. Dixon maintained of Mrs. Montgomery?

A. The folder that I have here are the records that Dr. Coen maintained on Mrs. Montgomery while he had her under his care and at Holladay Park Hospital. Some of them are carbon copies of the hospital records. There are a few additions such as a newspaper clipping or two at the time of Mrs. Montgomery's death that were added subsequently simply because our office girls do that sort of thing, but, in the main, they are simply the records that were left by Dr. Coen.

Q. Doctor, are you in a position from your knowledge of this case to answer the question that I put to you, [22] within your knowledge? Let me ask you this, Doctor. In your opinion—I ask you to explain to the Court and jury what mental derangement in your field means.

A. Well, I can only give you an answer in terms of what I personally understand by it because it is a word, it is an expression, it is two words, an ex-

(Testimony of Herman Dickel.)

pression which is used rather loosely, and I don't believe has any common understood definition. Most psychiatrists, I think, would use the words "mental derangement" to refer to those serious organic diseases of the central nervous system, particularly of the brain, which alter the mental ability or the mental functioning, such as a brain tumor or epilepsy or some serious infection of the brain or anything that occurred as a result of trauma such as an automobile accident or a gunshot wound or something of that sort. Now, that is ordinarily the way that the expression is used.

Q. Doctor, in your opinion from your personal knowledge of the case, that is, of seeing Mrs. Montgomery, and the records that have been maintained and the hospital records, was Mrs. Montgomery suffering a mental derangement at the time of the hospitalization in March and April of 1951?

Mr. Gearin: Your Honor, I object to that on this ground: If the Doctor is testifying from refreshed memories, I would think that I ought to have an opportunity to see his [23] records, secondly, he would be testifying upon what Dr. Coen said, and Dr. Coen's deposition has already been taken, and it is marked. Now, that is my point, your Honor. It seems to me that one doctor cannot testify what another doctor put in his notes. I may not have any objection if I have been able to see the documents that the doctors used.

Mr. Davis: Your Honor, I think maybe better still we can give Dr. Dickel all of the hospital rec-

(Testimony of Herman Dickel.)

ords. I don't know if he has seen them or not, and they are part of the evidence, and give the doctor a chance to go over them if the Court so desires.

The Court: I do not desire anything. You are offering the evidence. I am just passing upon the objections.

Dr. Dickel has testified that he only saw her on two occasions, and your question calls for an examination of other things not before the Court. If you want to give him a hypothetical question including all the facts, this witness can answer it, but he is not going to answer a hypothetical question based upon information not before the Court and the jury.

Mr. Davis: Dr. Dickel, assume that in March of 1951 a woman twenty-nine years of age was admitted to the Holladay Park Hospital at the request of Dr. Cooney who was the attending physician and who requested the psychiatric [24] partnership of Dr. Coen and Dr. Dickel and Dr. Dixon to be called in as consultants; that she was in the hospital for two days in March and was thereafter brought back to the Holladay Hospital in April of 1951 where she was there for two weeks and that during the time that she was there this patient was given five shock treatments with the written consent of her husband and that there was a diagnosis or a tentative diagnosis, Doctor, that there was a slight, slight schizophrenic changes, a paranoid trend. After the two weeks' hospitalization she

(Testimony of Herman Dickel.)

went home and was in good health until October 14, 1954.

Doctor, in your opinion, was that patient suffering mental derangement?

A. Not in my own personal opinion, no; not as I had defined the way I would use the expression.

Q. The mental derangement, in your opinion, now, was that an opinion of yourself or in the medical field?

A. I can only give you what is generally regarded because, as I said, there is no specific definition of the expression mental derangement, but it is ordinarily reserved for those disturbances where a non-organic problem exists.

Q. Doctor, I used the words "slight schizophrenic changes, a paranoid trend." Would you explain to the Court and jury generally or briefly what that is meant in the field of [25] psychiatry?

Mr. Gearin: I am going to object, your Honor. The records that have been introduced in evidence show the final diagnosis of Dr. Robert A. Coen "schizophrenia, paranoid type." I would have no objection if he asked what that was.

Mr. Davis: Very well.

The Court: What was it?

Mr. Gearin: Schizophrenic, paranoid type.

The Court: The objection is overruled. You may answer the question. It does not make any difference whether it is mild or severe. Schizophrenia is schizophrenia, isn't it?

(Testimony of Herman Dickel.)

The Witness: I assume it is, Judge.

The Court: Yes, some of it is mild. Tell the jury what schizophrenia is, paranoid type.

The Witness: In the field of psychiatry we use an expression "schizophrenic reaction," meaning that this is a particular way an individual acted or behaved or functioned at a certain particular time in his life. Schizophrenia, as a word from its old Greek meaning, means splitting of personality. It is a word which is not very well understood because people have the feeling that it refers to a Dr. Jekyll and Mr. Hyde sort of business, which is not the way that the doctors look at it at all. The word actually from a medical point of view, means the condition in which [26] an individual physically may be entirely intact, functioning, living, going about with the rest of us in the same way that the rest of us do, but mentally and emotionally is at that moment not functioning the way that he should. In other words, there is a splitting between the physical aspects of the individual and the emotional or the mental aspects of the individual.

Perhaps a little example might clarify it for you. Under certain circumstances, a person coming to court, say, on a Monday, getting up in front of a group of attorneys and the jury, would physically and mentally and emotionally show some degree of distress which I am sure I can manifest at the present time. In other words, my mental, my emotional, my physical reactions are all essentially the

(Testimony of Herman Dickel.)

same. They are all functioning pretty much in keeping with the situation.

A schizophrenic individual might physically be here, but mentally, in order to answer the question, might laughingly talk about the Queen of the May or what happened on the Fourth of July in 1854 or might get up and dance around or some such thing like that; a rather obscure example, but I used the obscure one in order to show you that they may physically be in the same world we are, but mentally and emotionally at that time they wouldn't.

The word "schizophrenia," therefore, refers not to a specific disease like pneumonia or chicken pox but [27] rather to the way that the individual is reacting. Unfortunately, nobody at the present time knows what is the cause of schizophrenia. It has been assumed up until the last three or four years that schizophrenia was entirely a disturbance "from the ears on up," putting it in ordinary language. In the last three or four years certain very important discoveries have been made. One of these discoveries is that it is possible to take the blood of a schizophrenic patient and inject it into an entirely normal person and produce schizophrenic symptoms so for the first time in the history of medicine we are beginning to doubt that there is such a thing as a mental disease in the sense that it is all in one's imagination. Apparently, it begins to appear that certain physical changes or endocrine or glandular changes in the body at any give time can produce a disturbance

(Testimony of Herman Dickel.)

which we would call in psychiatry a schizophrenic reaction so that at the present time in using the word "schizophrenia" the doctor refers to a particular way a person is reacting.

Schizophrenia may be a permanent thing, as is evidenced by the number of people who are in the State Hospital over a period of many, many years. Schizophrenic reactions may be temporary, as little as two or three days, and the reason why some are permanent and some are temporary, again we doctors do not know. If it is proven that it is a [28] chemical sort of problem, then we will know because chemical things can vary.

The expression "paranoid" refers to a schizophrenic condition or a schizophrenic reaction in a patient where the individual is blaming other people for the things that are going wrong in him. Now, we are all inclined to do that sort of thing a little bit, and in a schizophrenic patient or a patient with schizophrenia, that blame is to a degree that is serious, serious enough for the doctors to wonder about it, serious enough for the doctors to so label it. Under ordinary circumstances, all schizophrenic people blame others a little bit, but where it is used as a part of the diagnosis it is to a point where it is somewhat more serious, a little more serious than under ordinary circumstances.

I think that I could go on a long, long time, but I think that is enough.

Q. (By Mr. Davis): Doctor, with regard to

(Testimony of Herman Dickel.)

the diagnosis of that nature, does that mean that it is a permanent illness?

A. No, a diagnosis of schizophrenia, paranoid type, or that type of reaction, as I said, might be one that would be completely permanent. On the other hand, it might be a very temporary sort of thing. The diagnosis or the labeling is put down simply to show what this person was going through at that particular time. [29]

Q. Doctor, with regard to women, and I would like to ask you a question about women that are to be, maybe to commence menopause or have had difficult troubles with any menstrual problems, do you find in your profession that you have this problem?

A. Yes, quite a large number of women who are either in the menopausal years or, as we doctors say, the premenopausal years, late thirties or early forties, quite frequently manifest this sort of reaction, some of them on a very temporary basis, some of them on a longer basis, some of them occasionally becoming chronic.

Doctor, I hand you the form up there. Would you explain what is meant by nervous prostration, that is, if they use it in the medical field.

A. Well, occasionally it is used in the medical field in the same way that the expression "combat fatigue" or "operational fatigue" or "combat exhaustion" or "operational exhaustion" is used. In other words, the nervous system, just the same as any other system of the body, may reach an exhaustive, may reach a fatigue level, and I would assume

(Testimony of Herman Dickel.)

that the word "prostration" would be likened to that.

Q. Doctor, do you recall the hypothetical question I asked you about the patient that was in the hospital two days in March and then she was there for two weeks and was [30] given five shock treatments and then was home until October of 1954, was in good health and was getting along fine. Doctor, in describing, if you were going to describe it—you have already said that was not mental derangement. Would it come closer, or could you say what would be the appropriate thing to underline or mark her trouble?

A. Are you asking me as a doctor if I were filling this out, or are you asking me if the patient were filling it out?

Q. The patient.

Mr. Gearin: Your Honor, that is not within the doctor's specialty and invades the province of the jury.

The Court: I think that is right.

Q. (By Mr. Davis): Between the two choices, if you had two choices, mental derangement or nervous prostration, what would you mark or underline, in your opinion?

A. Well, it would be——

Mr. Gearin: Just a moment please, Doctor. We object to that, your Honor, because that only singles out one small portion of the application, one of the questions being, "Have you ever consulted any

(Testimony of Herman Dickel.)

physician for any ailment, not included in the above?"

The Court: He is not talking about that particular section.

Mr. Gearin: I think he can ask if her condition was [31] one of mental derangement. He can ask if it was one of nervous prostration, but I do not think he is entitled to ask the doctor, "What would you put down there?"

Mr. Davis: If your Honor please, in the application form that I am referring to now it does not say treatment by any other doctors. That is not in this application form.

The Court: Are you trying to find out from the doctor what he would put down for himself, as an expert?

Mr. Davis: Yes, your Honor, if he were filling out this application form and he had a chance to underline, what would he do, what would come closer to notifying the company what it was, your Honor.

Mr. Gearin: We object on the further ground, object to that way, your Honor, the question must be answered yes or no. I add that to my objection heretofore made.

The Court: He can put that in.

Mr. Davis: May I rephrase the question to this extent, your Honor?

The Court: All right.

Q. (By Mr. Davis): What would be the closest,

(Testimony of Herman Dickel.)

between the two, Dr. Dickel, that would underline this condition that I have described to you in my hypothetical question?

Mr. Gearin: Same objection, your Honor.

The Court: I am going to let the doctor testify. This is not what a layman would do, but this [32] would be a psychiatrist if he were filling out the application for himself if he were applying for insurance. Go ahead.

The Witness: First of all, I would have to state this, that I would have to know the diagnosis.

Mr. Davis: Well, I believe in my hypothetical question, Doctor, that I did mention to you that diagnosis had been made in the hospital records of schizophrenic, paranoid.

A. Yes, but am I as a patient supposed to know that I had the diagnosis?

The Court: The question does not involve the patient. The question involves what you would do if you were an applicant and you were given this application.

Q. (By Mr. Davis): I limit it to the two things, Doctor. It says mental derangement or nervous prostration, based upon the hypothetical question that I gave you.

A. Well, personally, I don't think I could answer that question for the simple reason that if as a specialist filling it out on myself I would have to assume that I had had the disease, and the only way I would know that I had the disease is if

(Testimony of Herman Dickel.)

somebody made it because I couldn't make it on myself so I would have to know that some other person had made it on me.

If I had been told that I had had this disease, if I was filling this out with the full knowledge that I had had this label, this disease placed on me, then I think [33] I would put probably nervous prostration because from what I have already said, to me mental derangement would refer to an organic disease.

Q. Dr. Dickel, with regard to shock treatment, would you tell the Court and jury what shock treatment is? Is it limited solely to people that are of nervous condition or are in mental stress? Would you explain generally what shock treatment is and what do they do it for?

A. Electric shock treatment or electric shock therapy, as the expression is sometimes called, is the utilization of a highly regulated, highly refined electric current for the production of unconsciousness just exactly the same way as ether or some other chemicals will produce an unconscious condition. Contrary to public belief, electricity is not used to shock people in the sense that the words to scare or startle them is used. It rather very smoothly and very nicely produces a state of unconsciousness. The depth of that unconsciousness can be completely controlled by the electric current. If the state of unconsciousness is very mild, you would hardly use the word "shock." If the state

(Testimony of Herman Dickel.)

of unconsciousness is rather profound or very deep as such sometimes occurs in a surgical operation with ether, then it is called a state of shock. A state of shock, therefore, in electric therapy, the state of unconsciousness produced by using [34] electric current, why it works in a variety of illnesses, nobody really knows, but it is used for a wide assortment of things in the field of psychiatry all the way in some instances from the very seriously mentally ill people in hospitals to the very mild sort of emotional or mental upsets that in some parts of the country would be treated not in hospitals but office practice.

As a matter of fact, more recently, because of refinements in the use of electricity, instead of being called shock it is now called electric stimulation, and electric stimulation is actually used for the treatment of such things as migraine headaches in some instances.

Q. Dr. Dickel, with regard—you made the statement that your patients, and is it within your practice, do you explain to a patient what your diagnosis is? Do you tell them that, generally?

Mr. Gearin: We will object to that, your Honor, unless——

The Court: Objection sustained.

Q. (By Mr. Davis): What is meant by a diagnosis? Would you explain that, Doctor?

A. Well, the diagnosis is the name of a disease or a condition or a disturbance that the doctor is

(Testimony of Herman Dickel.)

placing on a particular problem that a patient who he had had under his care has had. In other words, it is a label that the [35] doctor uses to designate what a person has wrong with him.

Q. Is that something definite within your field, Doctor?

A. As I stated before, in the field of psychiatry the diagnosis refers to the manner in which an individual is functioning or behaving at a given time. It is not necessary to refer to a specific disease of a specific organ of the body such as pneumonia would or whooping cough or appendicitis.

Mr. Davis: That is all.

Cross Examination

Q. (By Mr. Gearin): Doctor, did you discuss Mrs. Montgomery's condition with Dr. Montgomery, her husband? A. At what time?

Q. Prior to, say, well, during the time she was in the hospital on two occasions.

A. I don't recall ever doing it.

Q. Did she know that she was in Holladay Park Hospital?

A. I could not answer that either yes or no. I don't know.

Q. On the second floor of Holladay Park Hospital, is it not true, Doctor, the doors are locked?

A. They were at that time, yes.

Q. The patients cannot get in or out?

A. They were at that time.

(Testimony of Herman Dickel.)

Q. Does shock treatment cause convulsions?

A. It would depend entirely upon the manner in which the [36] individual gave it, I mean the individual doctor gave it. It could.

Q. Would you say that schizophrenia, paranoid type, was a mental illness?

A. Yes, I would say that.

Q. Would you say that in the layman's language, Doctor, that schizophrenia, paranoid type, was a mental derangement?

A. I think it would depend entirely upon the manner in which the individual used the expression. It possibly could.

Q. Doctor, you have reference to Dr. Coen's notes to refresh your memory, have you not?

A. Yes.

Q. May I ask, your Honor, that the bailiff obtain them and hand them over to me, please, so that I may see them?

(Document presented to counsel.)

Q. (By Mr. Gearin): Doctor, who was Frank Jacobson?

A. He was at that time a clinical psychologist who was attending the University of Oregon Medical School and did psychological tests on some of our patients at the office and at the hospital.

Q. You corresponded with Dr. Coen about the matter of prospective litigation arising out of the death of Mrs. Montgomery, did you? A. Yes.

Mr. Gearin: Your Honor, I would like to offer

(Testimony of Herman Dickel.)

that [37] portion of the file of Dr. Montgomery subsequent to the date of application, that is, October 13, 1954.

The Court: Dr. Montgomery?

Mr. Gearin: I mean, excuse me, Dr. Coen, the records from which Dr. Dickel has been testifying.

The Court: I do not think that anything he has said referred to any of the files. He merely testified that he saw her on two occasions. He does not remember anything, except what he saw, about the case. All the rest of it has been given on the basis of hypothetical questions so I do not think there is any portion of the file that is admissible.

Mr. Gearin: May I have it marked?

The Court: (To Mr. Davis) Do you want it?

Mr. Davis: No, your Honor, I have never seen it, and I was limited based upon objections, your Honor, and I had to ask my questions hypothetically.

The Court: I offered to permit you to do it.

Mr. Davis: I know you did, your Honor. I know it.

The Court: You do not want it in?

Mr. Davis: No, sir.

The Court: The objection is sustained. If you want it in, it goes in. If you don't want it in, I will sustain the objection.

Mr. Gearin: I have no further questions, Doctor. [38] Thank you.

The Court: Are there any further questions?

Mr. Davis: No, your Honor.

The Court: Ladies and gentlemen, Dr. Dickel has now testified for both parties. Is he excused from further attendance at the trial?

Mr. Gearin: Yes, sir.

Mr. Davis: Yes, sir.

Mr. Gearin: I wonder, your Honor, if Dr. Cooney is in the courtroom. [39]

(Witness excused.)

JOSEPH A. COONEY

called as a witness in the above-entitled cause, having been first duly sworn, was examined and testified as follows:

Examination

Q. (By Mr. Gearin): Dr. Cooney, what is your occupation or profession?

A. I am an osteopathic physician and surgeon.

Q. Do you deal in the field of psychiatry?

A. No.

Q. Are you on the staff of Holladay Park Hospital? A. No.

Q. Did you treat Mrs. Montgomery in the early spring of 1951? A. Yes.

Q. That is Anna Grace Montgomery?

A. Anna Grace Montgomery.

Mr. Davis: Dr. Cooney, I think you will have to speak up a little louder. I cannot hear you.

The Witness: I am sorry.

Q. (By Mr. Gearin): Did you treat her prior

(Testimony of Joseph A. Cooney.)

to the time that she was confined to the Holladay Park Hospital? A. Yes.

Q. Did you recommend that she seek psychiatric treatment?

A. Yes, I referred her to Holladay Park. [40]

Q. Was she confined to the Holladay Park Hospital more than once?

A. I couldn't answer that question.

Q. I understand, Doctor, that you were sick yourself that spring?

A. I was ill at that time.

Q. Were you engaged in practice through the spring, or were you out of practice for a considerable period of time? A. At which year now?

Q. I didn't hear the answer.

A. In what year?

Q. 1951. A. No, I was engaged full time.

Q. Did you know anything about her—at the time did you know that she went back to Holladay Park Hospital for a period of two weeks?

A. Do you mean did I know it professionally or as a matter of hearsay?

Q. Well, professionally, let's say.

A. No, I did not attend her professionally at that time.

Q. When she was confined to Holladay Park Hospital, did you discuss her condition with her husband, Dr. Montgomery? A. Yes.

Q. What is the fact, Doctor, as to whether or not you and Dr. Montgomery had an understanding

(Testimony of Joseph A. Cooney.)

that you did not discuss [41] with Mrs. Montgomery her mental illness?

Mr. Davis: If your Honor please, may I ask just one question? Is this an adverse witness, or is this—it is a leading question. That is the reason I asked.

Mr. Gearin: I asked him what the fact was, your Honor. I will withdraw the question.

Q. Was there an understanding, Dr. Cooney, between you and Mr. Montgomery—excuse me, between you and Dr. Montgomery—that Mrs. Montgomery's mental illness would not be discussed with her or in her presence?

A. May I ask that you clarify the word "understanding"? May I ask that you clarify the meaning of your word "understanding"?

Q. Did you understand my question, Doctor?

The Court: He does not understand the word "understanding."

The Witness: I don't know your use of it.

The Court: Did you have an agreement, or did you talk it over with Dr. Montgomery?

The Witness: We had no agreement other than you would talk over such things amongst yourselves.

Q. (By Mr. Gearin): Between you and Dr. Montgomery?

A. I am afraid I am a little bewildered. We talked it over in a friendly manner just as you would talk over anything like that with one of your friends.

(Testimony of Joseph A. Cooney.)

Q. That's right, and the subject of that [42] conversation, among other things, was her mental illness?

A. I have always been under the impression that it was not strictly a mental illness. Of course, that is out of my field.

Q. Was the subject of her mental illness discussed between you and Dr. Montgomery?

A. The subject of her illness was discussed between myself and him.

Mr. Gearin: I have no further questions.

Mr. Davis: This will be the same unless your Honor would like to have me bring him back this afternoon.

Mr. Gearin: That is all, right, your Honor.

The Court: All right, go ahead.

Examination

Q. (By Mr. Davis): Dr. Cooney, you had been the doctor for Mrs. Montgomery for some period of time; had you not? A. Yes.

Q. You had taken care of Dr. Montgomery and Mrs. Montgomery's children?

A. That's right.

Q. Where did you maintain your office at that time? A. In Oswego.

Q. Pardon? A. In Oswego. [43]

Q. On occasions were there things that you had taken care of as to Mrs. Montgomery's health? I mean, had you generally been the doctor for her?

(Testimony of Joseph A. Cooney.)

A. I had generally been advising with her about her health, and occasionally I would give her medication for the symptoms.

Q. She had had some type of woman—or suspension of uterus operation, hadn't she, Doctor?

A. That is true, yes.

Q. Do you recall when that was?

A. It was in the spring of 1951, I am quite sure.

Q. Did you call in a specialist to handle that for you?

A. I called in a surgeon to take care of the suspension.

Q. Doctor, would you explain to the Court and jury why, in your opinion, you felt that you should call in a specialist, a psychiatric specialist, and give generally the background?

A. On the day when it first became apparent that she was having a little disturbance——

The Court: Could you speak a little louder?

The Witness: On the day that it first became apparent that she was having emotional disturbance that I couldn't handle——

The Court: This is a suggestion. If you would look at the jury rather than looking at me, your voice would carry a little better. [44]

The Witness: On the day when she suffered an emotional disturbance that I couldn't take care of she was, oh, unreasoning, no one could reason with her, so I called in a specialist in that field.

Q. (By Mr. Davis): Doctor, what is your field, specialty, what particular field?

(Testimony of Joseph A. Cooney.)

A. Internal medicine.

Q. Internal medicine is what?

A. Diagnosis and treatment of diseases of the internal organs other than genitourinary.

Q. I am sure the jury can't hear you. I can't hear you.

A. It's diseases of the internal organs other than those of the genitourinary tract.

Q. Dr. Cooney, you were personally acquainted with Dr. Montgomery and Mrs. Montgomery; were you not?

A. I was personally acquainted with them.

Q. You went to school with Dr. Montgomery back East? A. Yes.

Q. What was her condition prior to the time you brought in a specialist?

A. To me it was that of a normal woman.

Q. Was she having any problems with her female organs? A. Oh, yes.

Q. Would you explain it to the jury?

A. Well, she would periodically suffer difficult menstruation. [45] She said it was scanty, which worried her. There was always a feeling of weight. She had had two children. There was always a feeling of weight in the pelvis.

The Court: Of weight?

The Witness: Weight, and there was a constant, you might call it drag on her resources because of that feeling, and a consequent nervousness and irritability associated with it.

Q. (By Mr. Davis): Now, you do not profess

(Testimony of Joseph A. Cooney.)

to be a specialist in the field of psychiatry, do you, Doctor? A. No.

Q. You are not attached to the Holladay Park Hospital staff? A. No.

Q. After she was out of the hospital the second time in April of 1951, did you observe her condition?

A. Yes, it was a sort of professional and social combined observation.

Q. Could you tell the Court and jury what her physical condition—was she depressed prior to this time?

A. During her depressed stage, you could almost diagnose that it was approaching the time of the menses. During those times that she was depressed you would naturally assume that she was getting near her period time. Do I make myself clear?

Q. Yes, I am trying to ask you this whether, being the [46] attending physician, did you reach a tentative diagnosis yourself why you called in a specialist?

A. I am ashamed to say, but I think she made the diagnosis herself when she told me that she had had two sisters who had gone through an early menopausal syndrome at early ages. She herself had not begun to menstruate until late in life comparatively, and those people who do that have an earlier menopause than a woman who begins normally at twelve to fourteen years.

Q. Doctor, in the course of your profession, you

(Testimony of Joseph A. Cooney.)

have observed people, have observed people that are mentally deranged?

A. In my particular field we must assume that any so-called mental disease has a physical background. I cannot explain it any better than that. We always look for the physical background of any mental disease.

Q. In your opinion, and you were the attending physician, was this a question of a mental breakdown or a nervous breakdown or a nervous condition or what?

A. You would call it a nervous breakdown if you were trying to explain it to anyone other than a man in the field of psychiatry.

Q. I broke in on you, but after she came out of the hospital, for the two weeks at the Holladay, did she come back to you again for any type of treatments or anything? [47]

A. From time to time, yes. I might clarify that a little bit in that she never particularly came in for herself alone. It was always in the discussion of one of the children whom she would bring to me for shots and consultation, and in the course of the conversation she would bring out her own problems.

Q. You said that you were the one that called in Dr. Coen when you felt you couldn't handle the situation?

A. That is right.

Q. What was her recovery after that, Doctor?

A. Remarkable, I thought. After two or three

(Testimony of Joseph A. Cooney.)

days in the hospital she seemed to respond quite well.

Q. Now, you had a heart attack when, sir?

A. 1953, November.

Q. And after that time you were out of the practice for some length of time?

A. That's right.

Q. Where are you practicing now, Doctor?

A. In Sandy, Oregon.

Q. Sandy, Oregon. I think that is all.

Cross Examination

Q. (By Mr. Gearin): After your 1953 coronary attack, who was her attending physician; do you know?

A. Yes, Dr. Burke who took over my practice when I had to [48] leave it.

Q. (Spelling) B-u-r-k-e?

A. (Spelling) B-u-r-k-e, yes.

Mr. Gearin: Now, your Honor, may I understand that this is cross examination?

The Court: Yes.

Q. (By Mr. Gearin): Doctor, subsequently, you came to an independent conclusion that she had a psychiatric problem, schizophrenia, paranoid type; did you not?

A. I cannot honestly say that I agreed with the psychiatric diagnosis.

Q. Did you subsequently after the hospitalization—

A. You mean agree with it?

Q. Yes.

(Testimony of Joseph A. Cooney.)

A. No, but there was nothing else I could do.

Q. When you saw her, she had been in a state of severe depression, had she?

A. No, when I saw her she was emotionally upset.

Q. I am sorry. I didn't hear your answer. Was your answer that she was or was not in a state of severe depression?

A. She was emotionally upset. She was not depressed, no.

Q. Was she ever withdrawn?

A. To my knowledge, I have never seen her that way.

Mr. Gearin: Page 23 of the deposition, your Honor. [49]

The Court: Doctor, do you remember when your deposition was taken by Mr. Hilliard?

The Witness: Yes.

The Court: All right, ask him the questions.

Q. (By Mr. Gearin): Do you recall at that time you gave this answer to this question:

“Q. Did you ever see her in moods of severe depression? A. Yes.”

Q. Did you so testify?

A. I did so testify.

Q. “Q. Would you say that her moods of depression were quite severe and caused her to become withdrawn?”

“A. I have never seen her in a withdrawn state except one time prior to the date of the first admission to Holladay Park.”

(Testimony of Joseph A. Cooney.)

Did you so testify?

A. I did so testify. That was the day of the admission in which I explained she was emotionally upset.

Q. Prior to the time of her first admission, Doctor, was she irrational?

A. She was irrational at the time I saw her before [50] admission, and I had seen her for about an hour before she was admitted.

Q. What was her attitude as to being out of the ordinary or not?

The Court: I do not know what that means.

The Witness: I don't either.

Mr. Gearin: I will withdraw the question.

The Court: Perhaps the Doctor knows?

The Witness: No, I am sorry, I don't know. Could you rephrase it?

The Court: That is a question that was asked you before which you apparently answered.

Mr. Gearin: Page 19 of the deposition, please. I will ask you, at the time of your deposition, Doctor, if you were asked this question and you gave this answer.

The Court: I do not see how you can impeach him with something he does not know the answer to now.

Mr. Gearin: Your Honor, the answer contains words, and they were his own words at the time. That was his answer, your Honor. I think under the circumstances I ought to ask him if he made that answer.

(Testimony of Joseph A. Cooney.)

Q. Did she know what she was there for?

A. I can't answer that. I don't know.

Q. She was worried about a couple of sisters that had had some disturbance, wasn't she?

A. Her sisters had undergone early menopausal symptoms.

Q. The same way that she had; do you know?

A. I don't know, no.

Q. Did she discuss that with you?

A. No, she would discuss occasionally her sister when she got a letter from her.

Q. Doctor, we discussed this before. I would like to discuss it with you once again.

Did you ever reach an independent conclusion that Mrs. Montgomery was possibly a schizophrenic personality?

Mr. Davis: If your Honor please, I think that should be limited in scope and time or up to the time of this application or something of that nature. I believe the question should be limited and not leave it wide open.

The Court: All right, prior to the date of the application.

Q. (By Mr. Gearin): Well, say prior to 1953, did you come to that conclusion yourself?

A. I would be unable to come to such a diagnosis in my field.

Q. Will you refer, please, to page 53 of your deposition, [54] the first question.

The Court: Read it.

Mr. Gearin: (Reading) "Q. I realize, of

(Testimony of Joseph A. Cooney.)

course, that this is outside your particular specialty, but did you reach the independent conclusion that she was possibly a schizophrenic personality?

“A. Oh, yes; later.

“Q. Do you remember approximately what year it was when you first reached that conclusion?

“A. I disputed the psychiatrist for about two years, until about her third admission.

“Q. Would that be in 1952 or '53?

A. About '53 or '54.”

Q. Did you so testify?

A. I did so testify. Here again, I want it understood that any conclusion I had regarding the psychiatric problems would be told to me and that the conclusion would not be my own.

Q. Well now, didn't you discuss with Dr. Montgomery the feeling that you had that she was possibly a schizophrenic personality?

A. I would discuss with Dr. Montgomery the treatment and symptoms of schizophrenia. I do not recall whether it was specifically about her case. I mean, it was in a [55] general field.

Q. Did he make any statements to you that he knew that she was possibly a schizophrenic personality?

A. If he did, it was because the psychiatrists had given him that diagnosis. I would have to accept that diagnosis.

Q. All right then, you and he discussed a diagnosis of her being a schizophrenic personality?

(Testimony of Joseph A. Cooney.)

A. Yes.

Mr. Gearin: Thank you, Doctor, I have no further questions.

Mr. Davis: Your Honor, I have one question that I didn't ask.

Q. Dr. Cooney, did the Bankers Union Life Insurance Company ever contact you in 1954 or 1955 or 1956 or up to the present time with regard to an application of insurance taken out by Mrs. Montgomery? A. No.

Mr. Davis: That is all.

Q. (By Mr. Gearin): Your deposition was taken by us in January of this year; was it not?

A. 1957, yes.

Mr. Gearin: I have no further questions.

The Court: That is all.

(Witness excused.)

The Court: Ladies and gentlemen, we are now going to [56] take a recess until two o'clock. Please do not make up your minds as to how this case should be determined until you have heard all the evidence, the arguments of counsel, and the instructions of the Court. Likewise, please do not discuss this case with anyone, even among yourselves, until the case is submitted to you. You are now excused until two o'clock.

(Thereupon, at 12:15 noon the jury retired for the noon recess, and the jury having retired, the following proceedings were had:)

(Discussion between Court and counsel off the record.)

Mr. Gearin: I don't know which way to turn right now. I don't know which way they are going, and that is the reason that I am perhaps stating no position. I still don't know what they are trying to do to me. This is all new.

The Court: Dr. McGee is an osteopath, as I understand it, and he was acquainted with Mrs. Montgomery and Dr. Montgomery, knew that she had been in the Holladay Park Hospital, and what else are you going to say, that he went through this question for the examining physician to make out, and then what?

Mr. Davis: Well, your Honor, I am not here, your Honor, to conceal anything. [57]

The Court: The point is this: You said a minute ago that you were not going to rely on waiver, and I do not understand what knowledge Dr. McGee would have to add unless you do rely on waiver.

Mr. Davis: Your Honor, could I see the second form up there, the application?

The Court: I think you have it, don't you?

Mr. Davis: No, sir, I do not want Mrs. Montgomery's application, but I want Dr. McGee's form. As I explained to the Court before, on this application form that Mrs. Montgomery filled out we do not feel there was any misrepresentation or any hiding of anything. Then apparently on Dr. Lee's deposition that I didn't read until last week this form comes out, and this is what the doctor filled out. Mrs. Montgomery didn't have anything to do with this except to answer questions.

Mr. Gearin: Well, then, what materiality is it?

The Court: Just a minute. Go ahead.

Mr. Davis: When the Doctor asked her the questions, Dr. McGee is going to testify that he has made out many of these for this insurance company, and the one that they are relying on that Mr. Gearin talks about, did you go to any other doctor for treatments for the different diseases, Dr. McGee is going to testify with regard to that and what his practice has been. [58]

Now, in this form, for instance, your Honor, it says, "Have you ever had undergone any surgical operation? Yes, suspension uterus, three years ago in February, Dr. Ira Neher." This was filled out. "Have you consulted or been treated by any physician for any ailment or disease not included in your above answers?" Now, there was the word "No"; then they wrote in the word "Yes," and then it says, "Dr. Joe Cooney," and it says, "Excellent." The words "Yes" and "Dr. Cooney." Now, your Honor, Dr. McGee is going to testify this, that he knew that there were other doctors at the hospital.

The Court: What hospital?

Mr. Davis: At the Holladay Hospital. He is going to testify that Dr. Joe Cooney was the attending physician for her. He knew that.

Mr. Gearin: That is on the application. We don't raise any point on that.

Mr. Davis: But, you see, based upon the cases, and I didn't mean to be disrespectful about it, but all the application form says, it says attending physician. It does not ask for any hospitalization. It does not ask for anything.

The Court: We will submit it on the issues framed by the pretrial order, but I cannot determine the impact of the testimony until I hear the testimony, and that is all [59] I am going to say. Where is the original?

Mr. Gearin: The original is back to the company. We had agreed that this may be used.

(Noon recess taken.) [60]

Afternoon Session, 2:00 p.m., Trial Resumed

The Court: Call your next witness.

Mr. Gearin: We will call Dr. Montgomery as an adverse party, your Honor.

JOHN L. MONTGOMERY

plaintiff, called as adverse party in behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Gearin): Your name is John Lyle Montgomery, and you are plaintiff in this case?

A. Yes.

Q. You are an osteopathic physician and surgeon?

A. Correct.

Q. How long have you followed your profession, Doctor?

A. I graduated from college in 1941, following which I interned for one year in the City of Detroit, and thereafter I practiced about two years in general practice and returned to take a specialty training and a residency in radiology, which is

(Testimony of John L. Montgomery.)

X-ray specialist, and I have practiced since that time in that specialty.

Q. Doctor, when did you and Mrs. Montgomery receive the policy that was issued upon her life?

A. As I recall, I believe that was issued in, I think, in 1954. I am not sure about that. [61]

Q. Calling your attention to the date of October 13th, is that the approximate date when the application was made or signed or executed?

A. I think that is correct.

Q. How soon after that did you receive the policy?

A. I don't recall exactly; probably a matter of a couple of weeks.

Q. In 1951, in March, did Mrs. Montgomery have occasion to go to the Holladay Park Hospital?

A. Yes.

Q. How did she get there?

A. She went to the hospital by ambulance.

Q. Did you accompany her?

A. I followed.

Q. How long did she stay in Holladay Park Hospital?

A. Just a couple of days, a short time.

Q. Did she thereafter return to Holladay Park Hospital? A. Yes.

Q. At either times, either time when she was admitted to the hospital, did you give your consent to electric shock therapy?

A. Yes, when any patient enters a hospital, it is

(Testimony of John L. Montgomery.)

necessary to sign forms such as surgical permits, and I signed all the forms necessary.

Q. In what ward of the hospital was she? [62]

A. Pardon?

Q. In what ward or part of the hospital was she?

A. She was on the second floor.

Q. Is that a psychiatric ward? A. Yes.

Q. Did you see her daily?

A. I don't recall that I went every day, but I went many days.

Q. Were the doors and corridors locked and you had to get a nurse with a key to let you in and let you out? A. Yes.

Q. Did she know where she was at the time that she was confined to Holladay Park Hospital?

A. Yes.

Q. Did you ever discuss her condition with Dr. Coen? A. We discussed her condition.

Q. The application that was given to you by the agent in this case, will you tell us briefly how that was executed?

A. I don't recall if the agent brought the forms to my office or if he mailed them. I would presume that he gave them to us in person. Then I would have taken the forms home, and, as I recall, we sat and discussed the questionnaire at home, filling it out at home.

Q. Did Mrs. Montgomery sign it?

A. Yes. [63]

Q. Did you go over the answers with her?

A. I again do not recall if I sat down immedi-

(Testimony of John L. Montgomery.)

ately afterwards and surveyed the answers or whether we discussed it across the table from one another after supper.

Q. Either one or the other? A. Yes.

Q. I was wondering, your Honor, if we could have the Exhibit No. 1, Deposition Exhibit No. 1, the application.

Doctor, did you ever live in Beaverton?

A. Yes.

Q. Was your address 616 Northwest 18th Street?

A. No, it was 4100 Southwest 109th.

Q. Do you know what 616 Northwest 18th in Beaverton was?

A. No, I know of no such address in Beaverton.

Q. You have been handed a document by the courtesy of the bailiff. Is that the application that you told us about that you took home?

A. Yes.

Mr. Gearin: We ask that that be received, your Honor.

The Court: Is it on the original policy, anyway?

Mr. Gearin: Yes, it is, but this is much larger, your Honor. The other one has been reduced.

Mr. Davis: We have no objection.

The Court: Admitted.

Mr. Gearin: I think this should be No. 3-A.

(Photostat of application form No. 59797, October 13, 1954, was thereupon marked Defendant's Exhibit 3-A for identification and received in evidence.)

(Testimony of John L. Montgomery.)

[Note: Exhibit 3-A—Application Form No. 59797 is the same as the Application Form included in Defendant's Exhibit 1 set out at page 227 of this printed record.]

Mr. Gearin: No further questions, Doctor, thank you.

Mr. Davis: Your Honor, we can wait.

The Court: All right.

Mr. Davis: That will be all.

(Witness temporarily excused.)

Mr. Gearin: We would like to read to the jury, your Honor, the deposition of Dr. Coen.

The Court: Ladies and gentlemen, I think you have seen this done before. Mr. Burns will act as Dr. Coen. In fact, he will be all the witnesses whose depositions are going to be read. This is a deposition. It is called a deposition de bene esse which is something a little different than the depositions that were taken for discovery purposes. Dr. Coen was down in California at the time that this deposition was taken, and he could not come to this trial; therefore, his testimony was taken under courtroom conditions, that is, before he testified he raised his hand and swore to tell the truth. He was interrogated by an attorney for the defendant and then cross examined by an attorney representing the plaintiff. In other words, the testimony of Dr. Coen was taken as nearly as it would be [65] taken had he appeared in person. You are to give it such weight as you think it deserves, using the same rules that I will lay down for you at the end of

this case for the evaluation of the testimony of witnesses. Proceed.

(Thereupon, the deposition of Dr. Robert A. Coen, taken April 8, 1957, in Berkeley, California, was read into the record as follows:

DEPOSITION OF DR. ROBERT A. COEN

“Q. Would you state your full name, for the record, please?

A. Robert A. Coen,—C-o-e-n.

Q. You are a doctor? A. Yes, sir.

Q. Do you have a specialty, Doctor?

A. Yes, I have.

Q. Would you tell us what that is?

A. Psychiatry.

Q. Where did you receive your medical training?

A. At the University of Oregon Medical School.

Q. What year was that?

A. 1934 to 1938.

Q. Would you tell us any other courses you have taken, studies, in connection with your profession?

A. I had two years of psychiatric residency at the Hastings State Hospital in Nebraska and one year which was accepted for training in the Medical Corps of the Army. [66]

Q. You practiced in Portland for a length of time? A. Yes.

Q. What office or doctors were you associated with in Portland?

(Deposition of Dr. Robert A. Coen.)

A. From 1946 until 1951 I was associated with Dr. Dixon—D-i-x-o-n, and Dr. Dickel.

Q. After that where did you go?

A. I had my own office until 1953; that was also in Portland. Since that time I have been taking research training.

Q. What is the nature of the research training that you are doing now, or is that general?

A. That is right. They are basic techniques so I can do research in psychiatry.

Q. Then I understand you are going to Nebraska after you leave here? A. Yes.

Q. Where are you going?

A. I am going to be the clinical director at the Hastings Hospital, Ingleside, Nebraska.

Q. In the future months, if we want to get in touch with you, that would be the place to do it?

A. I will be there.

Q. When you were in Portland did you have occasion to treat Anna Grace Montgomery?

A. I did. [67]

Q. Could you tell us under what circumstances and when you first treated her? You may use those hospital records, photostatic copies you have in your hand, to refresh your memory.

Those have been identified as an exhibit in the trial of this case to another deposition.

A. I saw her first as a patient at Holladay Park Hospital in March of 1951. To be perfectly accurate, I could conceivably have seen her in the office prior to that time but I don't think so.

(Deposition of Dr. Robert A. Coen.)

Q. That wouldn't show of course here. You don't have your own records with you, is that right?

A. No, I haven't. Dr. Dickel has them.

Q. They would be retained in the Portland office of Dr. Dickel? A. Yes.

Q. Would you just continue on with this, Doctor, and tell us what you saw her for and what her condition was?

A. I saw her with regard to the fact that she presented certain personality symptoms. She was admitted to the hospital for observation, and if required, treatment.

Her first period of hospitalization, which terminated March 10, 1951, turned out to be only for examination and observation.

However, she was later readmitted to the same hospital, again to the psychiatric ward, on April 9, 1951. [68] She then was given five electro-shock treatments. She was discharged April 22, 1951, to her husband.

Q. Is that the last occasion that you saw her, to the best of your recollection?

A. To the best of my recollection, yes.

Q. At least, as far as shown by the hospital records? A. That is true.

Q. How could you describe her condition in terms that a layman would understand?

A. She presented three things: One, a looseness of association by which is meant that her ideals did not hang together;

(Deposition of Dr. Robert A. Coen.)

Second, she presented ideals of references. This term is used to indicate people who feel that events or statements are meant for them; and

Third, she presented delusions of persecution. She felt that others were deliberately causing her trouble.

Q. That is the complete picture then, as shown to you?

A. It isn't complete from a technical standpoint, for there is usually an emotional disturbance that accompanies this, but in her case, I believe, there was some variation that would be a long sort of a discussion to describe the variations.

Q. Would it be something significant to us, do you think, Doctor?

A. I don't think so. [69]

Q. Did she have a history that you knew of of menopausal disturbances? I realize I am taxing your recollection on this, Doctor?

A. Not to my knowledge; not to my recollection, perhaps I should say.

Q. How many times did you see her, Doctor?

A. When she was in the hospital I saw her daily except for the times that she was seen by Dr. Dickel.

Q. Did he actively participate in the course of treatment at that time or were you handling the situation?

A. I have to say that since she had been referred to him, that he actively participated.

(Deposition of Dr. Robert A. Coen.)

Q. How many days, approximately, was she in the hospital for those two treatments?

A. You mean during those two admissions?

Q. The two admissions that you have testified on.

A. Approximately eighteen.

Q. You were seeing her daily during that time, I take it?

A. With the few exceptions, on days when she was seen by Dr. Dickel.

Q. Would you tell us what your medical diagnosis was for her condition?

A. I called her on each admission—let me put it this way, if I may: Her diagnosis on each occasion that I made was schizophrenia, paranoid type. [70]

Q. I know I am asking you to do something that you might not think is completely technically accurate, but could you tell us briefly, for the record, what type of personality that involves?

A. Do you want to know the type of personality, not the symptoms?

Q. I want to know just what is meant by that diagnosis?

A. Yes. The schizophrenic part of the diagnosis is characterized by a looseness and vagueness in thinking and by a disturbance of emotional response and by abnormal mental trends which may be either delusions or hallucinations. Is that sufficient?

Q. I think that answers my question, Doctor.

In this situation, was this something that you called an advanced case or can you classify it?

(Deposition of Dr. Robert A. Coen.)

A. I would say that she was an early schizophrenic and relatively mild in degree.

Q. Now, do you have any personal knowledge of her course of treatment after you last saw her?

A. No, I have not.

Q. Did you frequently confer or did you confer with Dr. Montgomery concerning her condition?

A. I saw him at least once and I think two or three times.

Q. Would it be necessary in a case of this type for you to advise him on her treatment and so forth, when she is back [71] at home, when she is left in his care; how do you handle the situation?

A. Ordinarily, yes, but I don't believe and I am hazy on this point, I don't believe that I made any particular recommendations because he would have obtained those recommendations from Dr. Dickel.

Q. You, of course, would have no personal knowledge to the extent that he conferred with Dr. Dickel about this? A. No.

Q. About Mrs. Montgomery herself, after you completed treatment, would you confer with her, discuss what had been done or what would be done in the future?

A. I discussed various things with her, just what I don't recall, but I would expect those things discussed to be primarily for the purpose of reassurance to her.

Q. That is the thing I was interested in, Doctor, and probably wasn't asking the question exactly right, but to what extent did you call to her atten-

(Deposition of Dr. Robert A. Coen.)

tion her difficulties and what adjustments, if any, she might have to make and reassurances you might be able to give as a result of the treatment?

A. I can't answer specifically. Ordinarily, patients who have finished a course of electro-shock are fragile people and they require great assurance, more than any specific program that they should follow; a definite outline of things [72] that they should not do would almost have to wait for a short time at least after shock was given.

Q. Would you describe how the shock treatments are administered, what it comprises?

A. Yes. Let me check one thing, because I don't recall that.

Briefly, the patient is given atropine approximately thirty minutes to an hour prior to treatment. The patient lies in bed during the entire course of treatment.

Two: The electrodes are placed on her head. Those electrodes being connected to a machine devised to produce the type of current that will initiate a convulsion. The treatment itself lasts a very short time, two or three minutes, ordinarily, after which the patient is unconscious quite briefly, awakens confused, must remain in bed until a half an hour later, that time being somewhat variable, at which time they are ordinarily reasonably clear.

Q. Was there any other treatment you were giving in addition to that?

A. Only of general nature, sedation at night required for sleep, hydrotherapy, which according

(Deposition of Dr. Robert A. Coen.)

to the records, was discontinued after a short time, and a general program of ward activity.

Q. Are you very selective with that shock treatment?

A. Yes. We arrive at that result after considerable consultation with a patient of this type. [73]

Q. How do you determine that that is the treatment she should have?

A. Things have changed since that time but at that time electro-shock was given to patients who presented any major psychiatric illness, or to patients who presented a depression of almost any degree. The degree was a matter of personal determination on the part of any psychiatrist. How depressed you had to be to have shock in those days was an individual decision.

Q. Do you use it less extensively now?

A. Yes.

Q. Would you have obtained, say the consent of Dr. Montgomery before giving it to his wife?

Q. That was necessary.

Q. So I can a little better understand this, what is the shock treatment supposed to do, what is supposed to be the reactions of a patient to that to get a satisfactory result?

A. In a simple way, it is supposed to relieve their symptoms. The mechanics of that effect is still unknown.

Q. After her second admission to the hospital under your care, had you any opinion as to whether

(Deposition of Dr. Robert A. Coen.)

she would need future treatments? Can you answer that?

A. I can't answer. Often they are necessary, occasionally at least they are not.

Q. But at the time you had finished after her second admission [74] to the hospital, I understand she was still in a delicate condition, or such that you would be very cautious about discussing the treatments you had given her or possibility of future treatment?

A. Since she had no treatment during her first hospitalization, I didn't discuss electro-shock with her until her last admission.

Q. Then you would explore the subject with her at that time, I take it?

A. I am not clear about your question.

Q. You would have obtained the permission of Dr. Montgomery to, of course, give the electro-shock, as you said?

A. Yes, sir.

Q. Would you also advise the patient of the nature of the treatment she was about to receive?

A. No. In a very vague reassuring way, yes, but nothing beyond that.

Q. In the difficulties that you diagnosed for this patient, Doctor, can it be related or is it related to the nervous system; in other words, did you find anything other than actual mental disturbance here, any organic nervous disorders?

A. There were no evidences of such but to be sure I called a specialist in the field of neurology

(Deposition of Dr. Robert A. Coen.)

and neurosurgery. His examination revealed no evidence of central nervous system disturbance.

Mr. Hilliard: I believe that is all I have, Doctor.

Q. (By Mr. Whitley): I just want to ask a couple questions to clarify something.

You explained, I believe, that your diagnosis was schizophrenia, paranoid type, is that correct?

A. That is correct.

Q. As you know, Mr. Hilliard and I are just laymen and are going to be laymen sitting on this case. Can you explain to us, would that be in medical terms or the general terms that you speak of, a disease of the brain, or how would you put that diagnosis, just in the simplest laymen's terms you can?

A. It is a mental illness.

Q. A mental illness?

A. Which does not necessarily imply that there is something wrong with the nervous system, but only with the functions of the nervous system.

Q. Would you call it a disease?

A. May I say something off the record.

Mr. Hilliard: Yes. This is off the record.

(Remarks off record.)

The Witness: I wouldn't call it a disease. It is an illness. The term mental disease is used by others.

Q. (By Mr. Whitley): One last question, Doctor: Are the words generally now, as used in your profession as a [76] psychiatrist, do they include the old term that we had nervous prostration?

(Deposition of Dr. Robert A. Coen.)

A. No.

Q. Is that more generally a layman's term, am I correct in that? A. That is true.

Q. So then actually the illness for which you treated Mrs. Montgomery, generally speaking as you would refer to, would be mental illness, is that the correct words to use?

A. That is right. Technically it is a psychosis, which is a mental illness.

Mr. Whitely: I think that is all.

Mr. Hilliard: That is all, Doctor."

The Court: Now, do you want him to go to Dr. Lee?

Mr. Gearin: Yes.

(Thereupon, the Deposition of Dr. Louis W. Lee, taken on August 12, 1957 and November 29, 1957, in Denver, Colorado, was read into the record as follows:)

DEPOSITION OF DR. LOUIS W. LEE

"Q. Please state your name and address.

A. Louis William Lee, 2501 Forrest Street, Denver, Colorado.

Q. What is your present age?

A. Sixty-four.

Q. What is your occupation or profession? [77]

A. Physician and surgeon.

Q. Are you duly licensed to practice medicine in the State of Colorado? A. Yes.

Q. How long have you been licensed to practice medicine in the State of Colorado?

(Deposition of Dr. Louis W. Lee.)

A. Thirty-seven years.

Q. Will you please give us a brief resumé of your educational background and your qualifications as a physician and surgeon.

A. I studied premedic work for two years at an extension course in State Teacher's College, La-Crosse, Wisconsin, after high school, and then I entered Hahnemann Medical College and Hospital of Chicago, and spent four years in medical education, and graduated from that school in January, 1919. I served in World War I for a while and was discharged in January, 1919, and entered Denver City and County Hospital and interned for one year. I later took charge of a small hospital at LaVeta, Colorado, for a Colorado mining company and the Denver and Rio Grande Railroad. I came back to Denver in 1929 and started private practice here in Denver. In 1930 I became the medical director of the Bankers Union Life Insurance Company. I belong to the Denver City and County Society and the American Medical Society, Denver Medical Club, staff membership at Children's and St. Luke's Hospitals. I guess that is about all. [78]

Q. Dr. Lee, are you the medical director of Bankers Union Life Insurance Company at the present time? A. Yes.

Q. When did you first become a medical director of Bankers Union Life Insurance Company?

A. January, 1930.

Q. You were employed then as medical director

(Deposition of Dr. Louis W. Lee.)

of Bankers Union Life Insurance Company during the month of October, 1954, were you not?

A. Yes.

Q. Have you served as an officer or director of Bankers Union Life Insurance Company other than as medical director?

A. As a director of the company.

Q. Have you also been an officer of Bankers Union Life Insurance Company? A. Yes.

Q. What office have you held?

A. Vice-president.

Q. What are your duties as medical director of Bankers Union Life Insurance Company?

A. To examine applications and medical reports on all applicants and to approve them for underwriting and issuing of policies.

Q. Have you exercised those same duties since 1930? A. Yes, sir. [79]

Q. And were you exercising those duties in October of 1954? A. Yes, sir.

Q. Are you familiar with the rules and practices of the Bankers Union Life Insurance Company which were in effect and in use in October of 1954 concerning the passing upon applications for life insurance and approval or rejection of such applications from a medical standpoint?

A. Yes.

Q. Did Bankers Union Life Insurance Company in October of 1954 issue an insurance policy on the life of Anna Grace Montgomery, whose residence address was 4100 Southwest 109th Avenue, Beaver-

(Deposition of Dr. Louis W. Lee.)

ton, Oregon, and if so, would you please identify the policy by its number?

A. Yes; No. 27244.

Q. I hand to you a photostatic copy of an application for life insurance and declaration as to insurability, which has previously been marked for identification as Defendant's Deposition Exhibit No. 1, this exhibit being identified during the deposition of John Lyle Montgomery on May 24, 1957, and ask you whether or not you can identify this exhibit.

A. (Referring to document.) Yes.

Q. Will you please state what the exhibit is.

A. The exhibit is an application on Anna Grace Montgomery, 4100 Southwest 109th Avenue, Beaverton, Oregon, for application for life insurance.

Q. I also hand to you a photostatic copy of declaration made to the medical examiner, this declaration having been previously marked as Defendant's Deposition Exhibit No. 2, which was also marked as such during the deposition of John Lyle Montgomery on May 24, 1957, and ask you whether or not you can identify that exhibit.

A. Yes, this is Part 2, which is part of the questionnaire on the medical examination on the application of Anna Grace Montgomery.

Q. Dr. Lee, do the photostatic copies identified as Defendant's Deposition Exhibits Nos. 1 and 2 constitute or compose the entire application of Anna Grace Montgomery for Policy No. 27244?

A. Yes.

(Deposition of Dr. Louis W. Lee.)

Q. Dr. Lee, did you personally examine the application of Anna Grace Montgomery during the month of October, 1954, and prior to the issuance that year of Policy No. 27244? A. Yes.

Q. Did you as medical director of Bankers Union Life Insurance Company approve the application of Anna Grace Montgomery for life insurance, photostatic copies of the application being marked Defendant's Deposition Exhibits Nos. 1 and 2? A. Yes, I did.

Q. Did Bankers Union Life Insurance Company approve the [81] application of Anna Grace Montgomery for life insurance, photostatic copies of both parts of the applications having been marked as Defendant's Exhibits 1 and 2?

A. Yes, they did.

Q. Did the Bankers Union Life Insurance Company issue its life insurance Policy No. 27244 to Anna Grace Montgomery following the company's approval of the application of Anna Grace Montgomery, photostatic copies of the application having been marked as Defendant's Deposition Exhibit Nos. 1 and 2? A. Yes, they did.

Q. Would said Policy No. 27244 have been issued by Bankers Union Life Insurance Company in accordance with the rules and practices of the company in effect and in use in October of 1954 if the application of Anna Grace Montgomery had not been approved? A. No.

Q. In approving the application of Anna Grace Montgomery, photostatic copies being marked as

(Deposition of Dr. Louis W. Lee.)

Defendant's Deposition Exhibit Nos. 1 and 2, did Bankers Union Life Insurance Company rely upon the statements and representations of the application contained in both parts of the application?

A. They relied implicitly on the answers of the questions as mentioned.

Q. Was the action of approval of the said application by [82] the company in accordance with the rules and practices of the Bankers Union Life Insurance Company in effect and in use in October of 1954? A. Yes.

Q. In October of 1954 were the answers to each and every one of the questions contained in the application, the application being composed of Defendant's Deposition Exhibit Nos. 1 and 2, deemed to be material to the risk by Bankers Union Life Insurance Company upon the company's consideration of the application for life insurance?

A. All the questions are deemed very material to the approval of the application.

Q. In October of 1954 was the answer to any one or more of the questions contained in the application deemed by the Bankers Union Life Insurance Company not to be material to the risk upon the company's consideration of the application for life insurance? A. No.

Q. State whether or not prior to the issuance of Policy No. 27244 there was submitted to the company or the company had any other knowledge of information or data in respect to the questions propounded in the application or the answers contained

(Deposition of Dr. Louis W. Lee.)

in the application? A. No.

Q. State the extent, Dr. Lee, to which you as medical [83] director of Bankers Union Life Insurance Company in each instance relied upon the answer made by the applicant, Anna Grace Montgomery, to the questions contained in the application in passing upon the application for life insurance?

A. I relied on the answers, definitely, in order to approve the application.

Q. Specifically, did you as medical director of the Bankers Union Life Insurance Company, in passing upon the application of Anna Grace Montgomery, rely upon the answers of said applicant to questions 27 (e), 28 and 29, which are contained in Part 1 of the application, a photostatic copy of which has been identified as Defendant's Deposition Exhibit No. 1?

A. Yes, they were definitely relied upon as to the answers given.

Q. Did the Bankers Union Life Insurance Company in passing upon the application rely upon the answers of said applicant, Anna Grace Montgomery, to questions 27 (e), 28 and 29, which are contained in Part 1 of the application, a photostatic copy of which has been identified as Defendant's Deposition Exhibit No. 1? A. Yes, they did.

Q. Were the answers made by the applicant, Anna Grace Montgomery, to the questions No. 27 (e), 28 and 29 contained in Part 1 of the application, or any of them, material to [84] the risk which

(Deposition of Dr. Louis W. Lee.)

the company assumed in issuing Policy No. 27244?

A. Yes, very much so, it was material to the risk.

Q. State whether or not Bankers Union Life Insurance Company was induced to issue Policy No. 27244 in reliance upon each of the answers to questions 27 (c), 28 and 29 or any of them, said questions being contained in Part 1 of the application, a photostatic copy of which has been marked Defendant's Deposition Exhibit No. 1?

A. Yes, because they would rely on that, they would be induced to write the policy. The answer is yes.

Q. Dr. Lee, did you as medical director of Bankers Union Life Insurance Company, in passing upon the application for insurance, also rely upon the answers of said applicant to questions 9 and 10 contained in Part 2 of the application, a photostatic copy of which has been identified as Defendant's Deposition Exhibit No. 2?

A. Yes.

Q. Did Bankers Union Life Insurance Company in passing upon the application of Anna Grace Montgomery, also rely upon the answers of said applicant to questions 9 and 10 contained in Part 2 of said application, a photostatic copy of which has been identified as Defendant's Deposition Exhibit No. 2? A. Yes.

Q. State whether or not Bankers Union Life Insurance Company [85] was induced to issue Policy No. 27244 in reliance upon each of the answers

(Deposition of Dr. Louis W. Lee.)

to questions 9 and 10, or either of them, contained in Part 2 of said application, a photostatic copy of which has been marked Defendant's Deposition Exhibit No. 2? A. Yes.

Q. Dr. Lee, I ask you to assume that Anna Grace Montgomery had disclosed to the Bankers Union Life Insurance Company in answer to questions 28 or 29 of Part 1 of her application, or in answer to questions 9 or 10 of Part 2 of her application for the issuance of Policy No. 27244, or in answer to any other question contained in the application, photostatic copies of which have been marked as Defendant's Deposition Exhibits No. 1 and No. 2, that she had been treated by Dr. Robert A. Coen, a psychiatrist in Portland, Oregon, in March and April, of 1951, and further assuming that Dr. Coen had diagnosed her condition as schizophrenia, paranoid type, and further assuming that all of the facts set forth in this question had been presented to the company by Anna Grace Montgomery in her application for the issuance of the above numbered policy, what action would the company have taken upon her application?

A. The application would have been declined.

Q. Had Anna Grace Montgomery disclosed in her application for insurance that she had been treated by Dr. Robert A. Coen in March and April of 1951, what requirements would [86] Bankers Union Life Insurance Company have insisted upon with respect to the consultation or treatment by said doctor?

(Deposition of Dr. Louis W. Lee.)

A. They would have insisted on a report from the doctor as to her condition, treatment, and diagnosis.

Q. In calling for any medical report or certificate from the physician who had been consulted by the applicant, would Bankers Union Life Insurance Company have requested the applicant to furnish the report or certificate or to authorize the physician to furnish such a report to the company?

A. Yes.

Q. Assuming that a request had been made to the applicant to obtain or authorize the company to obtain a report or certificate from Dr. Robert A. Coen, and assuming that Anna Grace Montgomery refused to permit the doctor to disclose the desired information, what action would have been taken by the company on her application for life insurance?

A. The application would have been declined.

Q. Would any action of declination by the Bankers Union Life Insurance Company referred to in your answers to the preceding questions have been in accordance with the rules, practices, and policies of the Bankers Union Life Insurance Company in existence and in use in October of 1954?

A. Yes, they would.

Q. Dr. Lee, I ask you to also assume that in Part 1 of the application for Policy No. 27244, a photostatic copy [87] of which has been marked Defendant's Deposition Exhibit No. 1, the applicant, Anna Grace Montgomery, had disclosed in addition to the information contained therein that she

(Deposition of Dr. Louis W. Lee.)

had treated by Dr. Robert A. Coen in March and April of 1951, and that thereafter Bankers Union Life Insurance Company had called for a medical report or certificate from said physician requesting the physician to state the reason for consultation or treatment, the date, duration, and result thereof, before considering the application further, and further assume that a certificate had been furnished by Dr. Robert A. Coen, and that Anna Grace Montgomery, upon the request of the company, had also furnished an additional statement to the company, and a photostatic copy of the records of Holladay Park Hospital in Portland, Oregon, and that the medical report or certificate from Dr. Robert A. Coen, the additional statement from Anna Grace Montgomery, and the hospital records of Holladay Park Hospital had contained the following assumed facts: That Anna Grace Montgomery was admitted to Holladay Park Hospital in Portland, Oregon, on March 7, 1951; that she was discharged from said hospital on March 10, 1951; that during her confinement in said hospital in March of 1951 she had been diagnosed as having a condition described as schizophrenia, paranoid type; that she was confined in the psychiatric ward of said hospital during that period of time; and that she had been [88] examined and observed by Dr. Robert A. Coen during that period of time; that Anna Grace Montgomery was readmitted to Holladay Park Hospital in Portland, Oregon, on April 9, 1951; that she was subsequently discharged on April 22, 1951; that

(Deposition of Dr. Louis W. Lee.)

she was confined to the psychiatric ward of said hospital during that latter period of time; that she was diagnosed as having a condition described as schizophrenia, paranoid type; that during the period of April 9th to April 22, 1951, while confined in Holladay Park Hospital she received not less than five electric shock therapy treatments; and that during her confinement to said hospital she was observed by and consulted with Dr. Robert A. Coen, what action would Bankers Union Life Insurance Company have taken in passing upon said application for life insurance, assuming that all of the facts stated in this question had been disclosed to the company prior to the issuance of Policy No. 27244?

A. The application would have been declined.

Q. Would the action of the company in declining to issue the policy have been in accordance with the rules, practices, and policies of Bankers Union Life Insurance Company in effect and in use in October of 1954? A. Yes.

Q. Assuming the same state of facts which were set forth hypothetically in the question previously asked you, was the applicant, Anna Grace Montgomery, in your opinion, in good [89] health during the month of October of 1954, and prior to the issuance of Policy No. 27244? A. No.

Q. State your reasons for the answer that you just gave to the preceding question.

A. The report from the hospital and treatment, as stated, and diagnosis indicates a chronic men-

(Deposition of Dr. Louis W. Lee.)

tal ailment which would be considered as an impairment in health at the time when the application was made.

Q. Assuming the same hypothetical facts regarding Anna Grace Montgomery, would she have been considered by Bankers Union Life Insurance Company as being in good health during the month of October, 1954 and prior to the time that Policy No. 27244 was issued to her? A. No.

Q. Please state the reason for the answer to the preceding question that you have just given?

A. They would rely on the okeh or the approval by the medical director as to the report on those conditions.”

Mr. Gearin: I think that is all for the first part of the deposition. Then we come to the cross-examination by Mr. Whitely.

(Thereupon, the reading of the Deposition of Dr. Louis W. Lee was continued as follows:)

“Q. Dr. Lee, I understand that you are head of the Medical Department of Bankers Union Life, is that correct?

A. I am Chief Medical Director.

Q. You are Chief Medical Director—that’s your proper title? A. That’s right.

Q. And how long have you been in that position, Dr. Lee? A. Since January, 1930.

Q. And you are also, as I understand, a vice-president of the company? A. Yes.

Q. And you are on the Board of Directors?

A. Yes.

(Deposition of Dr. Louis W. Lee.)

Q. Do you engage in any private practice other than—— A. Yes, I do.

Q. You engage in private practice as well as hold this position with Bankers? A. Yes.

Q. Can you state just briefly, Doctor, what are your duties as Medical Director?

A. I examine the applications for life insurance and the medical report on the applications that are usually with the application, and I approve or disprove those applications for issuing of life insurance policies.

Q. And do you do all that yourself, or do you have any [91] assistant to help you?

A. No, I don't.

Q. You do all of that yourself? A. Yes.

Q. Do you maintain an office with Bankers Union Life? A. No, I don't.

Q. You have your own office?

A. I have a part office with the first vice-president, a desk.

Q. With the first vice-president? A. Yes.

Q. And then you maintain your own——

A. Private office.

Q. Have you ever had any specialized training in either the field of psychiatry or the study of nervous and mental diseases or ailments?

A. No, I have not.

Q. And could you tell me just roughly—you say you examine these policies—how many of these would you go over in a year?

A. Oh, I would say two thousand.

(Deposition of Dr. Louis W. Lee.)

Q. Around two thousand a year. Now, in addition to checking these policies, do you ever in an application for life insurance locally here in Denver make the examination yourself?

A. Yes, I do. [92]

Q. And is it also the practice of your company when an applicant is in another area outside of Denver to have an examination made by some outside physician?

A. Yes.

Q. And was that done in this particular case?

A. Yes, it was.

Q. Now, you may refer to your file if you so desire. Do you recall what outside doctor made the examination of Mrs. Montgomery in the application for this policy of life insurance?

A. Dr. R. B. McGee.

Q. And where is he from, Doctor?

A. He is in Portland, Oregon.

Q. And he submitted a report on this particular case as to Mrs. Montgomery?

A. Yes, sir.

Q. And could you state from the examination of Dr. McGee's report which I believe has been marked as Defendant's Deposition Exhibit No. 2, a photostatic copy of which we have here, what did Dr. McGee report as to the state of Mrs. Montgomery's health?

A. He said she was in good health at the present time of the examination.

Q. And you went over that report along with the other report? [93]

A. Yes, sir.

Q. In evaluating the application, is that cor-

(Deposition of Dr. Louis W. Lee.)

rect? A. That's right.

Q. Again referring, Dr. Lee, to Defendant's Deposition Exhibit No. 2, the photostatic copy of the declaration made by the medical examiner forming Part 2 of the application, I refer you to Question 10, Subsection (e), which question reads: 'Have you consulted or been treated by any physician for any ailment or disease not included in your above answers? If so, give full details.' And I hand you this exhibit and ask what was filled in in answer to that question.

A. 'Nervousness before and after above surgery. As to results, doctor mentioned excellent, Dr. Joe Cooney.'

Q. Dr. Lee, I hand you the photostatic copy marked Defendant's Deposition Exhibit No. 1, and refer specifically to Question No. 27, Subsection (e), which reads: 'Have you had or have you ever been told you have had or have you been treated for' under Subsection (e) 'epilepsy, mental derangement, nervous prostration, syphilis, paralysis, convulsions, fainting spells?' I ask in referring to that question, Doctor, what was the answer given by Mrs. Montgomery? A. No.

Q. And did you notice on that question the words 'nervous prostration' as being underlined?

A. Yes. [94]

Q. May I ask you in connection with that question, Doctor, what is your definition or explanation of the words 'nervous prostration'? Can you explain a little bit in layman's terms to us?

(Deposition of Dr. Louis W. Lee.)

A. Yes, nervous prostration is a term used more or less by laity where some individual has a severe nervous condition such as being upset, confused, or restless, and not pertaining to any definite mental disease.

Q. Now, also referring, Dr. Lee, to the words 'mental derangement' as used in the same question, would you likewise explain what the meaning of those two words are?

A. Mental derangement?

Q. Mental derangement.

A. Mental derangement in just plain terms is where a person cannot concentrate properly and to interpret their, you might say, their expressions.

Q. I believe you stated on your direct examination that you had examined the records from the hospital where Mrs. Montgomery was confined in Portland, Oregon, called Holladay Park?

A. That's correct.

Q. And from your examination of those hospital records, Dr. Lee, would you say that Mrs. Montgomery would come under the classification as set forth in the application of having nervous prostration? [95]

A. No.

Q. Would you say that she came under the category of being mentally deranged?

A. No. That could be as an added symptom to what she had.

Q. Would you explain that for me?

A. In that when they have some psychosis, which

(Deposition of Dr. Louis W. Lee.)

she must definitely have had, they can be mentally deranged and not have the normal judgment, so you can add that to, sometimes add it to—I have seen a good many times where doctors have put down on a record in hospitals, say, neuropsychosis with definite mental derangement.

Q. But am I correct in this, that from the examination of the hospital records of Mrs. Montgomery, on those records *along*, you could neither say she was mentally deranged or had nervous prostration, is that correct?

A. That's correct, as far as not knowing any of that being put on the record. The only thing we go by is that she had a definite diagnosis, and you will have all kinds of symptoms with that kind of diagnosis.

Q. Well, that diagnosis could result, in other words, in any number of symptoms, is that right?

A. Yes, sir, hallucinations, deliriums, and, oh, such tendency towards suicidal intent, and so on.

Q. Well, it is not uncommon, is it, Doctor, for women experiencing the menopause or about to go into the menopause [96] to suffer from this nervousness and being upset and maybe crying frequently and being depressed?

A. It's very common.

Q. Such symptoms in a woman would not be classified as mental derangement, would they?

A. No, it has mental symptoms.

Q. Would it be classified as nervous prostration, those symptoms? A. Not entirely.

(Deposition of Dr. Louis W. Lee.)

Q. Is there any way that you could tell us so that a layman would understand, how can you classify it, or is there any way to do it, Doctor?

A. To classify severe psychosis or any branch of psychosis, mild psychosis?

Q. Let me restate the question and make it clear. If a woman were suffering from a mental depression and was crying and maybe had a persecution complex or the symptoms we mentioned that are oftentimes attendant to a woman going through the menopause, is there any way that a term could be given to express what that would be in one word or one classification?

A. The common expression is psychosis.

Q. You would usually say that is just a psychosis, is that correct?

A. That's right. There are different types of psychosis. [97]

Q. Could you tell me, Doctor, what is the policy of Bankers Union Life in the matter of issuing an insurance policy to a woman who is experiencing these difficulties such as I mentioned attendant with the menopause?

A. Mild neuropsychosis with menopause is insurable and is considered a fair risk.

Q. Doctor, referring again to Part 1 of the application for insurance marked Defendant's Deposition Exhibit No. 1, did the underlining of the words 'nervous prostration' by Mrs. Montgomery put you on any notice that she might be suffering

(Deposition of Dr. Louis W. Lee.)

from some mental or nervous condition encompassed within the meaning of that term?

A. Yes, it does, but the question was answered no, and then marked underlined that which we didn't put too much on that because in the other questions where it says nervousness, associated with the surgery and possible menopause would clarify it.

Q. Well, is it your testimony then that in answer to the following question which is Question 28 on the application, by putting down the word 'nervousness'—

A. And you will notice also—

Q. Let me finish. By putting down the word 'nervousness,' the date two years and the duration of about two months with the results excellent, and then listing Dr. Joseph Cooney as the attending physician clarified the answer that was [98] given in Question 27 wherein the words 'nervous prostration' were underlined, is that correct?

A. That's right.

Q. Well now, when you noticed, Dr. Lee, in Question 28 the disease or injury put down as nervousness and Dr. Joseph Cooney listed as the attending physician, was any effort made by yourself or anyone else in Bankers Union Life to check that further from any sources, through Dr. Cooney or any other source?

A. No, we didn't.

Q. And could you tell me briefly why no further check was made?

A. Because we have a number of applications

(Deposition of Dr. Louis W. Lee.)

that come in that way that mention sometimes nervousness in connection with surgery and so on that we do not follow up on unless we have some definite diagnosis, and so many of the questions were answered no. That's why we didn't have any idea and we did not get the information that we should have had, that is, all in the application and the medical part.

Q. Dr. Lee, I want to go back again to Question 27 of the application, Defendant's Deposition Exhibit No. 1, and if I recall your testimony, Doctor, just now, did you or did you not state that the trouble she had as you determined from the clinical records and the medical records of the hospital in Portland say that she had neither a mental derangement [99] nor nervous prostration?

A. No, I didn't say that.

Q. Well, that's what I wanted to clarify.

A. No, I didn't say that because they made a diagnosis at that hospital. Dr. Coen made a definite diagnosis.

Q. That's right, and that's what I want to get clarified, Doctor. Would that diagnosis of Dr. Coen in Portland result in saying that the patient, Mrs. Montgomery, was suffering from nervous prostration or a mental derangement?

A. Well, I can't answer that exactly because when he made the diagnosis of a schizophrenia, paranoid type, a mild type of insanity, and you can have all types of derangement and prostration and

(Deposition of Dr. Louis W. Lee.)

go to pieces and hallucinations and everything goes with it and persecution as you call it, and all that can go with it. I can't say that she had either prostration or derangement. I can't say that. I can't answer it that way because she can have all kinds of symptoms. That's just symptoms, but a definite diagnosis was made, and when they have a severe neuropsychosis of that type, why we decline every one of them.

Q. In that connection, Dr. Lee, and again referring to the records which you examined from the Holladay Park Hospital in Portland, was not Dr. Coen's diagnosis of a mild case—isn't that correct?

A. I don't remember whether he said mild or not, but he [100] said definitely a schizophrenia, paranoid type, and that's severe.

Q. And you say that is severe?

A. That is severe, definitely.

Q. Even if the doctor that examined her said it was mild?

A. Yes, sir, they couldn't say the paranoid type unless it was severe, if you know what paranoid type is. I know. Most of them go to the state hospitals, committed.

Q. Dr. Lee, it's common practice in the medical profession, is it not, for a doctor who is generally referred to as the attending physician to call in specialists to aid him and assist him on occasion if he feels their services are warranted in a particular case?

A. That's right.

(Deposition of Dr. Louis W. Lee.)

Q. In this particular case, Dr. Joseph Cooney was taking care of Mrs. Montgomery as the attending physician, and assuming that he diagnosed her trouble as stemming from the approach of the menopause and recommended advice or consultation or treatment by a practicing psychiatrist, Dr. Cooney would still be considered the attending physician, would he not? A. Yes.

Q. And any other doctor that was brought in on the case, either by Dr. Cooney or by Dr. Coen would likewise be consultants, is that correct? [101]

A. That's correct.

Q. Are you acquainted with a Dr. Herman Dickel in the City of Portland?

A. No, I am not.

Q. Are you personally acquainted with Dr. Robert Coen who formerly practiced in Portland?

A. No.

Q. Or are you acquainted with Dr. Cooney?

A. No.

Q. Would it have made any difference at all, Doctor, in your examination of this application whether the name of Dr. Cooney or Dr. Dickel or Dr. Coen was placed in the space marked for attending physician? A. No.

Q. Dr. Lee, in examining this application, after noting the words 'nervous prostration' being underlined, and the statement that was made by Mrs. Montgomery that she had been treated for nervousness, were you satisfied at that time that no further

(Deposition of Dr. Louis W. Lee.)

investigation was necessary on behalf of yourself or by Bankers Life in the issuance of the policy?

A. Yes.

Q. And it is true, is it not, that Dr. Cooney was never contacted in connection with any further investigation of Mrs. Montgomery?

A. No, he wasn't. From all the information I had on the [102] application and Part 2, I was satisfied from that information that it was all right.

Q. Dr. Lee, I refer to the deposition which you have given in this case on August 12, 1957, and on page 10 of that deposition, starting on line 7, the question was asked you which in substance was this: You stated that had the company known that Dr. Coen had diagnosed Mrs. Montgomery's condition as schizophrenia, paranoid type, you would have declined the application. A. Yes, sir.

Q. And if you had known that, you still say that Bankers would not have passed her on that diagnosis alone? A. No.

Q. And assuming that Dr. Coen in making his diagnosis of Mrs. Montgomery's condition as being very mild, would your company have still not issued the policy?

A. No, not on that diagnosis he made.

Q. Again referring to your deposition of August 12, same page, page 10, the question starting on line 23, you stated in substance on direct examination that had Bankers Union Life Insurance Company known that Dr. Robert Coen had treated Mrs.

(Deposition of Dr. Louis W. Lee.)

Montgomery in March and April of 1951, the company would have insisted on a report from the doctor as to her condition, treatment, and diagnosis. Do you recall saying that that was true? [103]

A. Yes, sir.

Q. Would you just clarify for me then, Doctor, why when Mrs. Montgomery indicated on her application that she had been treated for nervousness and had underlined the words 'nervous prostration' did you not consult Dr. Cooney who was given as the attending physician for that?

A. Because he did not make any diagnosis. Nervousness we don't pay much attention to if it's connected with menopause or with surgery.

Q. As I understand your previous testimony, no request was ever made for a medical report or a certificate from Dr. Cooney?

A. No. We had the medical physical report from this doctor that made Part 2.

Q. And you never requested Mrs. Montgomery to obtain or authorize Bankers Union Life to obtain a medical report or a certificate from Dr. Cooney?

A. With the application they sign a receipt at the bottom which we can refer to the doctors who treated her or made the examination for any other information that might be pertinent to the case.

Q. Now, Doctor, I am going to give a hypothetical question similar to that given to you on your direct examination to this effect. Assuming

(Deposition of Dr. Louis W. Lee.)

that Mrs. Montgomery was confined to Holladay Park Hospital on March 9, 1951 and was discharged from the hospital March 10, 1951, and was re-admitted to the [104] hospital on April 22, 1951, and she was diagnosed as having a condition of mild schizophrenia, paranoid type, and that during her confinement in the hospital she received five electrical therapy treatments, and further, she was examined by a specialist in the field of neurology and neurosurgery, and that this examination revealed no evidence of central nervous system disturbance, and that she was discharged without any further treatment being prescribed, under those circumstances, would Bankers Union Life still have refused to issue the policy? A. Yes, sir.

Q. And assuming the same set of facts, Doctor, which I set forth in the previous question, can you state with any degree of certainty what the condition of Mrs. Montgomery's health was in 1954 at or just prior to the time of the issuance of the policy?

A. No, only from the physical report given by the doctor.

Q. Would you clarify that answer for me just a little? You say no.

A. From the physical examination and report given by the doctor with the application for life insurance, that revealed her to be in good health.

Q. Maybe I didn't make myself really clear on this question. I will repeat. I know you are answer-

(Deposition of Dr. Louis W. Lee.)

doctors called in by the attending physician should have been listed, is that correct?

A. Absolutely.

Q. Would it not be true, Doctor, that if there were a question as to the insurability of Mrs. Montgomery, that the information as to her condition could have been obtained had the company contacted Dr. Cooney who was listed as the attending physician?

A. That's possible, but they did not show any such impairment that was necessary.

Q. Would it have been any more notice to you or to Bankers Union Life if the words nervousness had been put down on the ailment which Mrs. Montgomery allegedly suffered from and had she listed Dr. Coen and Dr. Dickel and whatever the name of the man was, the doctor in the field of neurology?

A. Definitely, because then we would have immediately figured that she had some mental disease that required specialists to help in.

Q. Would the mere fact that the names of the doctors were given indicate to you they were specialists?

A. No, we look them up in the directory and then we find out. We look them up in the medical directory and find out what their specialties are.

Q. Dr. Lee, the fact that you are the Director of the Medical Department of Bankers Union Life, also on the Board of Directors and a vice-president, you naturally have a pretty strong interest in the

(Deposition of Dr. Louis W. Lee.)

outcome of this case, do you not? A. Surely.

Mr. Whitely: I think that's all the questions I have.

Mr. Hames: I have just one question.

Examination

Q. (By Mr. Hames): Dr. Lee, prior to the time that you approved the application of Anna Grace Montgomery for the policy of life insurance that was issued to her in October of 1954, did you have any information of any kind or any indication of any kind that she had previously been diagnosed as having schizophrenia of a paranoid type?

A. No."

Mr. Gearin: Defendant rests, your Honor.

The Court: Have you any depositions?

Mr. Davis: No, your Honor, we do not have any.

The Court: Proceed, Mr. Davis. [109]

ROBERT C. McGEE

a witness produced in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Davis): Dr. McGee, what is your full name? A. Robert Columbus McGee.

Q. What is your profession?

A. I am an osteopathic physician and surgeon.

Q. Where are your offices?

A. Hillsboro, Oregon.

(Testimony of Robert C. McGee.)

Q. How long have you practiced this profession, Doctor? A. Fifteen years.

Q. Briefly, where did you get your training?

A. At Kirksville, Missouri; Kirksville College of Osteopathy and Surgery.

Q. Have you any specialty, Dr. McGee?

A. No, I am in general practice.

Q. You are licensed to practice here, osteopathy here in Oregon? A. Yes, sir.

Q. How long have you had a license?

A. Ten years.

Q. Dr. McGee, have you done work for the Bankers Union Life Insurance Company? That is, have you examined people at their request? [110]

A. I have.

Q. Were you previously acquainted with Dr. Montgomery and Mrs. Montgomery? A. Yes.

Q. Will you explain to the Court and jury your acquaintanceship with them?

A. Well, it was on a social basis. Dr. Montgomery and I are on the same staff at the Portland Osteopathic Hospital.

Q. Were you closely acquainted, or was it a close personal acquaintanceship or what?

A. No, it was entirely on a professional and social basis.

Q. Dr. McGee, would you explain briefly when a person comes in and wants to be examined for an insurance company what happens?

Mr. Gearin: Your Honor, we object unless it is

(Testimony of Robert C. McGee.)

confined to what was done at this particular time to this particular applicant and for this company.

The Court: Yes, I think so. Go ahead and tell what you did in this case.

The Witness: Well, the patient brought in the application.

The Court: Brought it in where?

The Witness: In my office.

The Court: Is that in Hillsboro?

The Witness: Yes, sir. [111]

The Court: You had your office in Hillsboro at that time?

The Witness: Yes.

The Court: Proceed.

The Witness: I filled out the questions and forms as they are stated on the application.

Q. (By Mr. Davis): The application form, your Honor, I wonder if Dr. McGee could be given it?

The Court: Yes.

(Application form presented to the witness.)

Q. (By Mr. Davis): Do you recall, Dr. McGee, at the time that Mrs. Montgomery came out there was she by herself, or was Dr. Montgomery with her? A. She was by herself.

Q. Do you know whether she made an appointment or not with you, or do you know whether an appointment was made?

A. Well, I think she made an appointment. I am not sure. I mean——

(Testimony of Robert C. McGee.)

Q. If you are not certain, say you are not certain. A. I am not certain.

Q. Did she hand you this form that you are holding in your hand there? A. Yes.

Q. That is an exhibit—has this been admitted?
Mr. Gearin: No. [112]

Q. (By Mr. Davis): Dr. McGee, did you fill out that form in your own writing, in your own handwriting? A. Yes.

Q. Did you sign it yourself? A. Yes.

Q. Is that a photostatic copy or a copy, if you can look at it, of the original application form?

A. I would assume yes.

Q. Do you recognize your handwriting there?

A. Yes.

Mr. Davis: At this time, your Honor, we would move that the Deposition Exhibit No. 2 be admitted into evidence.

Mr. Gearin: I have no objection.

The Court: It may be admitted.

(Thereupon, photostatic copy of application form previously marked Deposition Exhibit No. 2 and remarked Plaintiff's Exhibit No. 2-A for identification, was received in evidence.)

[See pages 230-231.]

Q. (By Mr. Davis): Now, in filling out the form, can you recall exactly what happened when Mrs. Montgomery was there?

A. No, I couldn't state exactly. It has been quite a while ago.

(Testimony of Robert C. McGee.)

The Court: Will you speak a little more loudly, Dr. McGee? [113]

The Witness: Yes.

Q. (By Mr. Davis): This application, is it in duplicate or triplicate or what?

A. It has been quite a while since I have filled one out, but I am sure it is just the one form. I don't recall any duplication on any of the Bankers' policy forms or any of the other insurance forms.

Q. Do you have a copy that you keep in your office? A. No.

Q. Is there a copy that you give to the applicant or to Mrs. Montgomery?

A. No, I mailed this in myself.

Q. Does she sign anything on the application form?

A. Not on the part that I fill out.

Q. Well, that is the whole thing there, isn't it, Doctor?

A. Well, yes, but over on the other side she signs, and this was filled out, as I recall, before she came in. That is her personal part to fill out for Bankers, sir.

Q. You say she filled that in before she brought it in?

A. Well, I don't remember whether it was or not, but I believe—I believe that was filled at the office. She filled that out herself, then we came to my part. I don't recall exactly.

Q. Dr. McGee, you made an examination. Would

(Testimony of Robert C. McGee.)

you tell the jury and the Court what examination you made. Did you [114] just follow this form down there? A. That is right.

Q. Would you start in on the form and advise the jury what you found and what you did and what you filled in?

A. Would you like for me to go clear through the whole thing?

Q. Well, no, the jury will have it, but do you ask a question? Is that a question and answer form where you ask a patient part of it?

A. Part of it; check the patient individually.

Q. Did you make a complete physical examination of Mrs. Montgomery? A. I did.

Q. Did you reflect on this form what your examination—what you did and what you found?

A. I did.

Q. With regard to reflections, just briefly what examination do you make for the insurance company?

A. We check knee jerk, ankylosis, muscle tone, is about the extent of the questions that are asked on these forms.

Q. Do you take blood pressure?

A. Oh, yes.

Q. Do you have them take various tests to determine their blood pressure after they have done exercise, things of that nature?

A. I believe that is true in this form. It is so many times. [115] I would have to go over it.

(Testimony of Robert C. McGee.)

Q. Doctor, have you done work for Bankers Life before? A. I have.

Q. Have you filled out applications for them before for other people? A. I have.

Q. Are you one of their, are your names on their list to do work for them? A. Yes.

Q. Do you bill the Bankers Union Life for this work? A. I do.

Q. They pay you then? A. Yes.

Q. From your examination and the tests which you made, Dr. McGee, of Mrs. Montgomery, did you fill that out in your report?

A. Yes, as I found it.

Q. What did you report to Bankers Union Life with regard to her over-all general physical condition? A. She was in good health.

Q. Do you take any type of a test that has anything to do with their physical and mental condition, Dr. McGee?

A. Not anything further than what is on the application.

Q. Did you ask the questions of Mrs. Montgomery regarding phases of those questions there? Did you discuss it with her? [116]

A. Well, that I don't remember. I assume that anything that needed discussion, why, we discussed it. I don't remember.

Q. Could I see that?

(Exhibit presented to counsel.)

Q. Doctor, No. 10, I believe: "How long have

(Testimony of Robert C. McGee.)

you known applicant and how well?" Your answer was: "Four years."

A. Yes.

Q. Do you recall that?

A. Well, I don't recall it, but that would be about right.

Q. Doctor, there were certain things in this medical history of Mrs. Montgomery that you knew yourself, didn't you? A. Yes, some of it.

Q. Was that through discussions with Dr. Montgomery or on the staff or something of that nature?

A. Right.

Q. There are a number of personal questions in here on the back that Mrs. Montgomery signed also, is that correct? A. Yes.

Q. That is what you are referring to, her signature? A. Yes.

Q. You don't know whether she filled this in or how? Do you know that? A. No, I don't.

Q. With regard to this: "Have you consulted or been [117] treated by any physician for any ailment or disease not included in your above answers?—(If so, give full details.)" Now, the first one, you said, "Have you ever undergone any surgical operation?" The answer is, "Yes, Suspension Uterus, Excellent, Dr. Ira Neher." Who furnished the information to you?

A. She did.

Q. Did you know that she had had an operation or was having trouble, Doctor, with her uterus?

A. Yes, I had known, yes—I didn't know ex-

(Testimony of Robert C. McGee.)

actly what type of surgery she had had. I knew that Mrs. Montgomery had been in the hospital and had undergone surgery, but I had never checked into exactly what it was.

Q. This question (e), "Have you consulted or been treated by any physician for any ailment or disease not included in your above answers," there was the word, "No"; then it was crossed out, and it was, "Yes." "Name of Ailment—Nervousness before and after above surgery—excellent—Dr. Joe Cooney."

I would like to hand this back, give it to you, Dr. McGee, and ask you if you know whether that is in your writing or in whose writing that is?

A. That is not in my writing.

Q. That is printed?

A. That's right.

Q. Doctor, do you recall having a conversation with [118] Mrs. Montgomery with regard to that?

Mr. Gearin: We object, your Honor. The doctor has already said he does not remember any discussion with regard to questions and answers.

The Court: Objection overruled. Answer the question.

Q. (By Mr. Davis): Did you have a discussion with regard to this, Dr. McGee, discussing the filling out of this form?

A. I may have. I can't recall.

Q. Did you know that Mrs. Montgomery had been confined in the Holladay Park Hospital?

Mr. Gearin: Objected to, your Honor, on the

(Testimony of Robert C. McGee.)

grounds and for the reason that the information he received from outside sources would not be binding upon the company unless it was disclosed at the time of the examination that he made for which he may have been deemed to have been acting in our behalf.

Mr. Davis: I will limit my question, your Honor.

Q. At the time that you examined Mrs. Montgomery for the Bankers Union Life, did you know of the prior condition, Doctor, that is, her nervous condition?

Mr. Gearin: Just a moment, please. We object, your Honor, on the grounds and for the reason that his knowledge at that time may have been acquired from other sources, and I think it should be limited to the information—to his examination that he made at that time, and I further object upon the other ground, that the witness has stated he cannot [119] recall what was said at the time.

The Court: I am going to sustain the objection at this time with permission to make an offer of proof in a few minutes.

Mr. Davis: Very well, your Honor.

The Court: Did Mrs. Montgomery tell you that she had been in the Holladay Hospital?

The Witness: I don't recall, your Honor.

The Court: Go ahead.

Q. (By Mr. Davis): Dr. McGee, let me ask you as a basis of questions of whether you recall it or not, there were certain things that you knew yourself, and there were certain discussions that

(Testimony of Robert C. McGee.)

you had at the time of the examination; isn't that correct, Doctor? A. Yes.

Mr. Gearin: This is leading, your Honor. It is his witness, your Honor. The witness says he can't remember.

The Court: I am going to take a recess now for about ten minutes. Ten minute recess.

(Thereupon, the jury returned for recess, and, having retired, the following proceedings were had out of the presence of the jury:)

Mr. Davis: If your Honor please, the question I would like to ask—

The Court: Ask it. [120]

Q. (By Mr. Davis): Doctor, I had discussed this matter with you Saturday afternoon with regard to—

The Witness: Yes.

The Court: Wait a minute. Just ask him the questions. This is an offer of proof. Just ask him that same question that you asked before; namely, did you know whether she had been in the Holladay Hospital of your own knowledge?

The Witness: Yes.

Q. (By Mr. Davis): Did you know, Dr. McGee, that she—that a consultant psychiatrist was brought in to see her and treat her for a psychiatric condition?

A. I assumed that because of the Holladay Park being what it is and knowing that Dr. Cooney is not on the staff.

Q. Well now, when you assume it can you re-

(Testimony of Robert C. McGee.)

call, Dr. McGee, whether you had discussed in the office with Mrs. Montgomery regarding this nervous condition, discussed it with her personally or not?

A. I wouldn't say. I imagine we did, but I can't—I can't say that I did.

Q. The reason I asked you this question based upon your personal knowledge and based upon any conversations you had, at this time you do not know whether it was at the office or whether it was from other personal information; is that correct?

A. That is correct. [121]

Q. And for that reason you do not want to testify what was said at the office because of your personal knowledge and your conversation?

A. That is correct.

Q. Doctor, to every question that you recall asking Mrs. Montgomery, did she give you an answer?

A. Yes, as I remember, every question was answered.

Mr. Davis: Now, I have not finished, your Honor. There are other questions I was going to ask the defendant in the presence of the jury, but the offer of proof would be that, your Honor, of his prior knowledge.

The Court: Are you telling us that she may have told you about the Holladay Park Hospital?

The Witness: It may have been brought up, your Honor, but I can't say whether it was a conversation that we heard at the staff at the hospital or whether it was questions that were brought up

(Testimony of Robert C. McGee.)

by her. I just really can't—I really can't say. Truthfully, I just can't remember.

The Court: She may have disclosed to you that she had been to the Holladay Park Hospital?

The Witness: Well, I already knew that, but whether it was discussed by she and I at the time, your Honor, I can't remember.

The Court: Do you want to ask any questions (to Mr. Gearin)? [122]

Mr. Gearin: No, sir.

The Court: How does it happen you did not disclose that to the company then if you knew she had been to Holladay Park Hospital?

The Witness: Well, they asked for the referring doctor. I didn't know anything about it. I mean, I know she had been there, but to what extent or who had seen her, they asked for the referring—or who her attending physician was, and, as far as I knew, it was Dr. Cooney. I didn't know who specifically had been her doctor before, and I don't recall that I asked that. They asked for the attending physician, and I just put down Dr. Cooney.

The Court: You didn't think it was incumbent upon you to divulge that information?

The Witness: Well, I didn't feel it was necessary, your Honor.

The Court: Did you know that she had been diagnosed as a schizophrenic?

The Witness: No, sir, I didn't.

The Court: You never knew that?

(Testimony of Robert C. McGee.)

The Witness: I didn't know that until after this time, as I recall. I knew she had been in there for what was technically a nervous condition. I knew that she had had pelvic surgery.

The Court: At the Holladay Hospital? [123]

The Witness: No, at our hospital.

The Court: She had been in the Holladay Park Hospital because of the nervousness?

The Witness: Right.

The Court: You didn't know which doctor treated her?

The Witness: No, sir, I didn't.

The Court: You didn't know the severity of the illness which she suffered?

The Witness: No, sir, I didn't.

The Court: You relied solely upon her statement that the results were excellent, or did you discuss it with Dr. Cooney?

The Witness: No, I didn't discuss it with Dr. Cooney what the word "excellent" was. In talking with her she was, as far as I was concerned, perfectly well.

The Court: Did you talk it over with Dr. Montgomery?

The Witness: No, I didn't.

The Court: Did you regard it as strange that they would come out to Hillsboro to have an examination?

The Witness: No, because they lived at Beaverton, and it was really closer. I don't remember whether Mrs. Montgomery called and made an ap-

(Testimony of Robert C. McGee.)

pointment or whether they just came out. No, I didn't think that a bit strange, sir.

The Court: It seems to me that in view of the witness' [124] statement to the effect that he does not recall exactly whether Mrs. Montgomery told him that she had been to Holladay Park Hospital or whether he knew it from prior contact makes this testimony admissible on the ground that she may have divulged the information to him and he, in his judgment, elected not to put it down.

I realize that it is highly irregular for a physician to do that, but this man says that is what he did, and I appreciate the fact that it is difficult testimony to meet, but I am going to overrule the objection and permit the witness to testify. If you want to bring in a question of collusion, you can do it.

Mr. Gearin: It is a little bit difficult at this time, your Honor, to do it at this time. The doctor can't remember. I won't make any remarks about how I feel personally, but I think it is difficult enough to try a case for an insurance company with all that prejudice, and I think your Honor has gone out of your way to make a case for them when, according to their testimony, they never had it in the first place. I feel badly about it.

The Court: Mr. Gearin, I just do not like those remarks. I have tried to give everybody a square deal, and I have leaned over backwards for you in this trial and in other trials, and this type of remark does not go in this case. I believe I am

(Testimony of Robert C. McGee.)

going to hold you in [125] contempt. I am going to assess penalties after this case. No one has ever accused me before of going out of the way to help an insurance company or to hurt an insurance company, and I think it is highly improper for you to have made that kind of a statement when I have tried my very best to see that this trial is conducted in the very best manner and asked this jury to leave while I took this testimony under the rule or an offer of proof.

Mr. Gearin: I have never been consciously disrespectful to this Court or never——

The Court: Yes, you were just now.

Mr. Gearin: If your Honor feels that way, I apologize and apologize sincerely, but I feel the testimony of the witness is such that they didn't have a case, and I thought your Honor's interrogation was unnecessary.

The Court: Of what witness?

Mr. Gearin: Of the witness on the stand.

The Court: Are you talking about in the absence of a jury?

Mr. Gearin: Yes, sir. Now, perhaps I have misunderstood, but it seems to me that when you ask me is there anything I want to do after I have made my objection and it has been sustained and then you are going to let it in again——

The Court: I am not letting this testimony go in. This is an offer of proof. [126]

Mr. Gearin: You said you were going to overrule my objection.

The Court: Yes, but these questions are not going to be propounded to the jury. I am not asking him any questions. Mr. Davis is the one that asks him the questions.

Mr. Gearin: That's right, and then I have interposed an objection, and your Honor indicated—and I may be mistaken and I hope honestly that I am—that the objection would be overruled and that I could go into the question of collusion. Now, that indicated to me that you were going to let this testimony go before the jury.

The Court: What testimony are you talking about?

Mr. Gearin: The testimony with regard to the offer of proof.

The Court: I am just trying to find out whether his testimony concerning the statements he made to this deceased are admissible or not admissible. None of this offer goes before the jury.

Mr. Gearin: I don't like to argue with your Honor, but I am in the dark. I don't know where I stand now. I am in contempt—

The Court: You certainly are.

Mr. Gearin: May I ask the nature of the Court's ruling with regard to your statement that you are overruling the objection? May I inquire as to that? [127]

The Court: I told you the reason. The reason why I interrogated this witness further was to determine precisely the basis upon which this testimony may or may not be admissible. It was admissible, in any event, because the witness has

stated here that he does not recall exactly what the deceased told him. She may have told him that she had been to Holladay Park Hospital in addition to his own knowledge. If that is true, then the plaintiff has the privilege of bringing that out because his interpretation of the questions would depend upon the information divulged to him at the time. That is the only thing that I have ruled upon, that he can bring out that information. That is all I did. I didn't do it in the presence of the jury. I didn't ask him one question in the presence of the jury.

Mr. Gearin: Well then, I am still, your Honor, confused as to whether or not the jury will be entitled to the testimony that the witness may or may not have discussed this and she may or may not have told him. That is the purpose of my present inquiry.

The Court: And that was the purpose of your inquiry when you accused me of leaning over backwards against the insurance company; isn't that right?

Mr. Gearin: Your Honor, I am still——

The Court: Answer the question.

The Witness I don't know how to answer it, your Honor, [128] because I don't know precisely whether or not you have sustained the offer of proof. I made no objection. I asked no question. Now, your Honor sustained my objection previously, and then Mr. Davis made an offer of proof. Now, the offer of proof, I know, was made outside the presence of the jury. Is the ruling of the

Court now that this matter can be gone into in the presence of the jury?

The Court: That is absolutely right, and the witness—I changed my ruling. He can ask that question. The jury is not going to be read the questions and answers that were made either by Mr. Davis or myself.

Mr. Gearin: Well, I understand that, your Honor. That is never done.

The Court: Yes.

Mr. Gearin: During an offer of proof, I mean, that stays in the court record, and then what the jury hears is what comes from the stand, but I just wanted to get clear in my own mind——

The Court: Now, I am clear in my own mind. I thought you might have been mistaken, but there was no mistake. You accused this Court of leaning over backwards against the insurance company in favor of this plaintiff, didn't you?

Mr. Gearin: I felt, your Honor, that your interrogation [129] in connection after counsel had made his offer of proof, I felt, was unnecessary.

The Court: Unnecessary?

Mr. Gearin: Yes, sir.

The Court: You are not the one to determine whether I regard it as necessary, and I thought that actually I was asking questions which were favorable to the insurance company.

Mr. Gearin: I did not so understand it, your Honor.

The Court: Do you mean to say that when I said to him that it is highly irregular for a physi-

cian not to divulge that you felt that was a friendly remark towards the plaintiff?

Mr. Gearin: I didn't think—well, every time I open my mouth I get into further trouble.

The Court: Bring down the jury.

(Thereupon, the jury returned to the jury box, and the following proceedings were had in open court:) [130]

ROBERT C. MCGEE

recalled, testified as follows:

Further Direct Examination

Q. (By Mr. Davis): Dr. McGee, at the time Mrs. Montgomery was out in your office for examination, at that time did you have knowledge that Mrs. Montgomery had been in the Holladay Park Hospital here in Portland? A. Yes.

Q. Did you know the names of the doctors that were taking care of her at the Holladay Hospital?

A. No, I didn't.

Q. Do you know that they were doctors there—I mean, let me ask you this question, Dr. McGee. Did you know that Dr. Cooney was not affiliated or attached—

The Court: Well, that is not the question that you indicated you wanted to ask. You wanted to ask, and the question that I sustained an objection to and later set aside my ruling was: Did she divulge to him at the time that she had been to the Holladay Hospital. First, let him answer that question, and then you can proceed with the other line of interrogation.

(Testimony of Robert C. McGee.)

Mr. Davis: Yes.

The Witness: I don't recall at the time whether that was discussed or not. I did know that she had been to Holladay Hospital, but whether it was discussed, your Honor, [131] at that time or not I don't remember, with Mrs. Montgomery.

Q. (By Mr. Davis): Dr. McGee, in filling out the form, "Results—Excellent," I believe you testified that you filled this form out and found her health was good? A. Yes, sir.

Q. Was there any indication, Doctor, when you examined her at that time that she was suffering from any mental disease or mental illness or was under a nervous tension of any kind?

A. No, sir.

Q. In filling out this particular form, it is over a course of conduct, I assume, Doctor, these examinations that you do for the insurance company; is that correct?

A. I didn't quite understand that question.

Q. Well, you can't recall, can you, Doctor, exactly what took place in your office with Mrs. Montgomery that particular day, do you?

A. No, I don't.

Q. But, is it a course of conduct that you do with each person that would come in?

A. Yes, as the form itself states, I do just as that says.

Q. In filling out the form about the list of doctors that you have advised and in filling out that form or if it is filled out making inquiry of doc-

(Testimony of Robert C. McGee.)

tors, what do you do? Do you list all doctors, or do you find out what particular [132] doctor?

A. No——

Mr. Gearin: Objection, your Honor. We would like this confined to what was done then.

The Court: Yes, objection sustained. What did you do in this particular case?

The Witness: In this particular case I just put down the one attending physician.

Q. (By Mr. Davis): That was Dr. Cooney?

A. Right.

Q. Are you given any particular instructions, Doctor, from the Bankers Union Life Insurance Company? Do they send you a form of instructions and ask you to do certain things and to get certain information that does not appear in this application form? A. No, sir.

Q. Pardon? A. No, no comment.

Q. There is nothing, no rules and procedures they have given you?

A. Only what is on the form that the patient brings—or the examinee.

Q. In that form, why, the attending physician was put on, or it was on?

A. I put it on, Dr. Cooney as attending physician. [133]

Mr. Davis: I think that is all.

Cross Examination

Q. (By Mr. Gearin): Doctor, you cannot recall specifically anything that was said between you

(Testimony of Robert C. McGee.)

and Mrs. Montgomery at the time of your examination?
A. No, sir, I cannot.

Q. As far as putting down Dr. Cooney's name, you knew that from beforehand, did you?

A. No, I knew that Dr. Cooney was her attending physician, and I can't remember whether the question was asked. I assume that I asked her, but to say exactly I asked Mrs. Montgomery, "Who is your attending physician?" I can't say I honestly remember that, but I knew that Dr. Cooney, while she was in our hospital, under our care, I knew he was her attending physician. I assume I asked her because it is the thing to do, to ask who her attending physician is, so I assume I asked her, but to say exactly I remember I asked her I can't say.

Q. You don't have any memory one way or the other with regard to that particular question or the particular answer on the form, do you?

A. No, no.

Q. Thank you, Doctor, I have no further questions. [134]

Mr. Davis: One other question, your Honor, I should have asked.

Redirect Examination

Q. (By Mr. Davis): In the back of that form that you filled out which was signed by Mrs. Montgomery, I asked you if some of that was her writing, but was part of that your writing on the back of that form, Doctor?

A. May I check that again? (Witness examines document.) My signature is on there.

(Testimony of Robert C. McGee.)

Q. All right, with regard to the words, "Excellent" and so on, do you know who wrote that?

A. I couldn't say. I assume that—well, I just wouldn't want to say because it is printed and I couldn't say for sure that I did it or Mrs. Montgomery.

Q. From your examination of Mrs. Montgomery, your physical examination, your conversation at the time you were with her, was there any question in your mind, Doctor, as a doctor, that there was anything wrong with this woman?

A. At the time I examined her, no.

Mr. Davis: That is all.

Recross Examination

Q. (By Mr. Gearin): Doctor, you did not make a mental psychiatric examination, [135] did you?

A. No, I didn't.

Mr. Gearin: Thank you, Doctor. No further questions.

The Court: You are excused from further attendance at the trial.

(Witness excused.) [136]

JOHN L. MONTGOMERY

plaintiff, recalled, testified as follows:

Direct Examination

Q. (By Mr. Davis): Dr. Montgomery, Mr. Gearin went briefly into your background. How long did you practice general osteopathy back East?

(Testimony of John L. Montgomery.)

A. Well, I was an osteopathic physician for a period of about two years in general practice. Then, as I related, I went back and took a residency in a hospital to become a radiologist or what is more generally known as an X-ray specialist.

Q. What year was that, Doctor?

A. Well, that would probably have been, let me see, 1942, two years—1944—probably—before I took my residency?

Q. When did you get your specialty, Doctor?

A. Oh, my specialty training, well, that is easier for me to figure. I have been a specialist approximately ten years.

Q. When did you first meet Mrs. Montgomery?

A. I met Mrs. Montgomery near the end of my internship, which would have been in 1942. I took a vacation and went to this resort area where she lived.

Q. Briefly, shortly after you met Mrs. Montgomery, several months later, did you marry her?

A. Yes, there was a short courtship, and then she came to Detroit, stayed with an aunt, and we continued our courtship, announced our engagement and became married.

Q. Where were you practicing, in Detroit later on, or did you go to a smaller community?

A. Soon after we were married we went to a smaller community.

Q. Where was that?

A. A community called Spring Lake, Michigan, on the West Coast of Michigan.

(Testimony of John L. Montgomery.)

Q. Where was Mrs. Montgomery born and raised?

A. She was born and raised in St. James, Beaver Island, Michigan, which is an island offshore of the West Coast of Michigan, Lake Michigan.

Q. How long was she there, Doctor?

A. She went through high school there, after which she came out and lived with a sister in a larger community and worked at various and sundry things, and she had returned again to her home because of the lingering illness of her father, and that was the time at which I met her.

Q. After you were married, you had two boys; is that correct?

A. Two boys. They are eleven and thirteen.

Q. During the periods of the birth of the children and so on, would you explain to the jury her physical condition, her general health? [138]

A. Well, the first few years that we were married my wife and I—or I should say my wife was subjected to frequent hospitalization by virtue of the fact that we proceeded immediately to have a family. She had a chronic appendix, and, not wanting that to flare up during pregnancy, she went in the hospital right away and had an appendectomy about the third month we were married. Thereafter, she became pregnant, delivered our first child, and as soon as her health returned she became pregnant again and became quite ill about the fifth month and aborted and lost a girl. As soon as her health returned, then she again became pregnant

(Testimony of John L. Montgomery.)

and delivered our last son. Do you want me to continue through——?

Q. When did you move out to Oregon, Doctor?

A. We moved out to Oregon about 1950.

Q. Briefly, could you just tell the jury her health condition up to that time?

A. Mrs. Montgomery had had one operation before we moved to Oregon, and she had had one ovary operated upon. We noted after our arrival here that the rain the first winter was depressing to her. The times that it was most noticeable were in relationship to her menstruation, particularly after the menses, and she had two small children to take care of at that time, and she became during those periods agitated and depressed, and it was hard to pin down just what the [139] reason was. She also developed a facial neuralgia that was superimposed up on top of all this, and eventually she had to have a surgical cleansing of an area of infection in the bone.

Q. That involved her death; is that correct?

A. Yes.

Q. At the time, Doctor, just immediately prior to going to the hospital in March of 1951, could you explain to the Court and jury what her condition was?

A. Well, as I previously stated she would at times become agitated and she was smoking two to three packs of cigarettes a day, and at times she would cry, or I might come home and find her crying and, oh, yes, and at times she felt that her,

(Testimony of John L. Montgomery.)

some of her own relatives had said things in the past that upset her that were not true.

Q. Doctor, who was her attending physician at that time, during that period of time?

A. The doctor who testified here earlier, Dr. Joseph Cooney. He is primarily an internist, a man that deals with diagnoses.

Q. When were you advised, or were you advised that Mrs. Montgomery was going to be sent to the hospital?

A. The first time that she went to the hospital.

Q. In March?

A. In March, yes. Dr. Cooney suggested to us that she be sent to the hospital because her agitation was to such [140] an extent that he didn't feel, from a medical viewpoint, that it fell within his realm to manage it, and he would like to have consultation.

Q. Did you agree to that, Doctor? A. Yes.

Q. What did Mrs. Montgomery feel about it?

A. She did not agree. She argued the point with us and did not concur the first time, and so we had to put it to her quite bluntly that, well, she just had to go, and that's all there was to it.

Q. That was March, and that was for two days, Doctor?

A. Yes, for two days of observation, following which she came out, and she was over her resentment towards us telling her that she had to go. She realized that it was a good thing then, and she was glad that she had gone in.

(Testimony of John L. Montgomery.)

Q. At that time was there a question involving menstrual period. A question of menopausal, Doctor?

A. If you are asking me about that particular moment she was in a menstrual cycle at that particular time and day, I don't recall, but these periods of depression were usually associated with that time, and so it could well have been.

Q. How old was your wife?

A. My wife was, as I recall it at that time, twenty-nine; however, we related this to a menopausal situation despite her youth and because it is well-established that, oddly [141] enough, the earlier women begin their menses the later they go through their change of life, and the later they begin their menses the earlier they go through their change of life. My wife had not begun her menstruation until she was seventeen, and she gave a history of having two sisters who had gone through very early menopausal changes, in their late twenties, early thirties.

Q. Who was it that decided in April—it was just less than a month's time, wasn't it, that Mrs. Montgomery was taken back to Holladay Hospital?

A. Yes.

Q. Would you explain why?

A. Yes, because again she became depressed and agitated and would cry and would smoke cigarettes. She was never an individual to drink heavily, but if we went out socially I don't mean that she would get drunk. She would nervously drink her liquor

(Testimony of John L. Montgomery.)

and be excitable a combination not of drunkenness but a combination of this nervous agitation, smoking cigarettes and putting her drink down and talking in an agitated manner with people and skipping from one subject to another in her discussion. Therefore, I talked it over with her and with Dr. Cooney, and she agreed again that this time to go back to the Holladay Park, and Dr. Cooney referred her there again.

Q. Dr. Montgomery, at all this time, and I use a layman's [142] language in it, was she mentally deranged; was she doing things as how I would understand—was she—did you feel she was a menace or dangerous or a mental——?

A. Oh, no, no, there was nothing about it that was dangerous. Those things—mentally deranged I would immediately conclude was some organic thing like tumor pressure or previous injury to her skull, some type of thing like that. It would not have fitted in that category. In extreme psychiatric situations like, for instance, with menopausal situations, you have many depressive states, but then you also have in psychiatric situations some manic states in which category she didn't fit at all.

Q. In April she was there for about two weeks; is that correct, Doctor? A. Yes.

Q. Did the doctor at that time discuss with you, or was she—I believe Dr. Coen's deposition said they released her to you. Would you explain to the

(Testimony of John L. Montgomery.)

Court and jury how she was at that time when she was out of the hospital?

A. I went and saw her daily. She enjoyed good health. Her shock therapy which has been discussed previously, shock can be administered in varying degrees depending upon the situation for which you are treating the individual, and she was always able to coherently talk with me. I was aware of her shock therapy by virtue of the fact that she told me [143] when I came into the hospital, "Well, I had shock therapy today an hour ago," or she had shock therapy the day before, or she would say, "I am due for a shock treatment next Friday." She was not particularly perturbed. I will retract that. She was perturbed on one thing. She didn't like to be on the second floor because on the second floor it is psychiatric, and they keep the doors locked, but they have everything up there from alcoholics to people who are in cells and manacles, and she—it took her a while to accept the fact that there were other people in there who were like she was. At first she was upset to think that she had been put in here where there were patients—she heard one patient screaming loudly on her way to hydrotherapy. It upset her to think there were patients like that in there, but once she found she had freedom of the place, she could play cards with these people, she found two people that she knew who were in there, and she would take me down to the solarium and introduce me to the people who were there that you could play

(Testimony of John L. Montgomery.)

cards with or checkers or smoke cigarettes and talk, and, as I recall, I think they later—I am not sure, but I think they even gave her freedom to go out and get a newspaper or something like that, something of that order.

Q. After two weeks, Doctor, the question I asked you was after two weeks she was let out of the hospital; is that [144] correct? That would have been in the latter part of April, 1951. Now, what was her health condition after she was out of the hospital up to October, 1954, generally?

A. Her health was good. She took to gardening, and we started to take vacations in the winter to break the monotony of the rainy situation, and we started to go south into California and Mexico in the winter and would usually take our children along. She participated with everything with me socially, went to our staff meetings once a month and dinners with the doctors and their wives, and we went out socially everywhere together. She liked to dance. We did a great deal of that.

Q. Doctor, did she take trips where she took the children, for instance?

A. Yes, one summer then she took the car and the two children and one of the technicians in the hospital, and they drove east, and she and the children visited with her mother and spent probably two weeks there and then returned, probably gone for the best part of a month.

Q. Was there any nervous condition after this

(Testimony of John L. Montgomery.)

time, or did she have trouble with her menstrual periods or anything of that nature?

A. Yes, she continued to have some trouble during her menstruation and would be definitely edgy during those times and probably smoke a little heavier but I couldn't [145] say that—certainly there was no comparison to the way she had been previously.

Q. In talking with Dr. Cooney or Dr. Dickel or Dr. Coen, did you ever discuss the matter with Dr. Dickel, to your knowledge, at that time?

A. No.

Q. Did you talk with Dr. Coen; do you recall?

A. I don't recall personally meeting with Dr. Coen in the hospital or our going up to his office, but I recall that we discussed it on the telephone once and possibly twice.

Q. About your wife's condition? A. Yes.

Q. At that time did he give you a diagnosis that she was a schizophrenia, paranoid?

A. No, he did not state that to me. He talked again in terms of nervousness, nervous exhaustion, prostration; that it would be very good for her to get outside and develop herself in the garden and relax to take some of the burden of the responsibility of the children from her and that type of thing.

Q. You naturally were interested in the welfare of your wife, weren't you, Doctor?

A. I certainly was.

(Testimony of John L. Montgomery.)

Q. Did you discuss with Dr. Cooney and Dr. Coen?

A. Yes, most of my discussions would, of course, have been [146] with Dr. Cooney because I would see him around the hospital frequently.

Q. Dr. Cooney didn't know anything about the Holladay Hospital situation did he, Doctor?

A. He had referred her.

Q. That's what I mean, but with Dr. Coen did you have any conferences with him, discussions with him, to your knowledge? A. No.

Q. Other than the telephone? A. No.

Q. At the time the application for the Bankers Union Life Insurance Company was taken out, would you briefly give the background of how you happened to take out this policy—you took out a policy for yourself, didn't you? A. Yes.

Q. Would you briefly explain the background of it?

Mr. Gearin: Your Honor, I don't think this would be material unless it has to do with the execution of the application.

The Court: Objection sustained.

Q. (By Mr. Davis): You have testified briefly of receiving these forms. You do not know whether it was in your office or whether it was mailed to you or not; is that correct?

A. Mr. Graham brought those forms to us, but I don't recall whether he mailed them or whether he dropped them [147] off to the house personally.

Mr. Davis: If your Honor please, I would like

(Testimony of John L. Montgomery.)

to for this one purpose go into the background briefly if I may have the right later on to lay a matter of proof.

The Court: You would like to do what?

Mr. Davis: I would like to go into briefly the background of the purpose of taking out this policy. I don't believe it is pertinent.

The Court: I don't think so. I am going to sustain the objection. I will let you make an offer of proof later.

Q. (By Mr. Davis): In filling out the application, Doctor, some of this writing, Doctor, or the printing on it, are you able to identify it, what you filled in yourself or whether Mrs. Montgomery filled it in or not?

A. It appears to me that a fair portion of this is in my handwriting. It is so fine that there are, there are some places where I would have to debate, and it is so long ago that I cannot definitely recall. For the most part, I would say that a great deal of it is in my handwriting; that we probably sat down and went over this together.

Q. You filled out the forms. Now, who underlined the "nervous prostration"; do you know?

A. Offhand I would say no to that, but first I have to find it.

Q. It is 27. [148]

A. Well, all of the N's here, there are just two letters to try to determine the handwriting from. They are just No, and these N's appear to be made

(Testimony of John L. Montgomery.)

continuously. If they are, then they are not my handwriting.

Q. When discussing it with Mrs. Montgomery, you decided to underline "Nervous prostration," didn't you, Doctor? A. Yes.

Mr. Gearin: Just a moment, Doctor. That was highly leading. I ask that that be stricken and the jury instructed to disregard it.

The Court: I think it is leading, and the jury is instructed to disregard it.

Q. (By Mr. Davis): What is underlined, Doctor? A. Underlined is "Nervous prostration."

Q. Do you know why it was underlined?

A. I would judge it was underlined—

Q. No, I just want to know why; do you know why it was underlined?

A. Because she was nervous.

Q. Well, is there any other—in the questions that were asked in this series any other place to mark or underline with regard to this hospitalization, in your opinion, or in your wife's opinion that would cover the situation?

Mr. Gearin: We object to the opinion, your Honor. The document speaks for itself. [149]

The Court: I think that is true. That is a matter of argument.

Mr. Davis: All right, your Honor.

The Witness: Do I understand—

The Court: No, there is no question.

Mr. Davis: What did the effect, what was this underlining of "Nervous prostration," do you know

(Testimony of John L. Montgomery.)

what it was covering, what it was supposed to be covering?

A. I would know that it would be making an exception in (e) which states epilepsy, mental derangement, nervous prostration, syphilis, and so forth; that it would be making a notation of an exception; that she put No because she knew she didn't have all these other things as syphilis, epilepsy and so on, but there was a notation underlined here because this was an exception.

Q. You do not understand my question, Doctor. Did it apply—to what period of time of illness or sickness?

A. Oh, that she had nervous prostration?

Q. Yes.

A. It would apply to her condition several years previously.

Q. All right, are you referring to the condition that she was in the hospital? A. Yes.

Q. Then after underlining this, this was written in below there, wasn't it, in 28? [150]

A. "Nervousness, two years ago"?

Q. Correct.

A. "Complications, none; Results, excellent; attending physician, Dr. Joseph Cooney."

Q. Do you know whether you filled that in, whether your wife filled it in or what, Dr. Montgomery? A. No, I do not know.

Q. Then there was a suspension of the uterus at what time?

A. The suspension of the uterus was around the

(Testimony of John L. Montgomery.)

same time. It may have been done just a little before that. In other words, that was not two years. The suspension might have been three years.

Q. In filling out, working on this application, Doctor, did you assist your wife, both of you assist each other in filling it out? A. Yes.

Q. Was there anything that you were attempting to conceal in this application from this insurance company? A. No.

Q. This was just a straight life insurance, wasn't it, Doctor?

A. No, this wasn't straight life insurance. This was——

Mr. Davis: Just a minute. Your Honor, I should not have asked that question, and I will make a matter of proof on it. I am sorry, I should not have. [151]

The Court: All right.

Q. (By Mr. Davis): At the time this application was filled in, would you tell the Court and jury what Mrs. Montgomery's general health was and her physical condition?

A. Why, her health and physical condition were——couldn't help but qualify it as good. She had the ability to do all her housework, to manage her two children, to take our car and drive it to the store and shop, to take a vacation, to go anywhere with me socially, and I would just say that it was good.

Q. Was it any different, or, I mean, did you have completely normal relationships of husband and wife, and was she a healthy woman?

(Testimony of John L. Montgomery.)

A. Yes, we had completely normal relationships.

Mr. Davis: I think that's all.

Cross Examination

Q. (By Mr. Gearin): Doctor, referring to the application where "Nervous prostration" is underlined, what answer was given by you and by Mrs. Montgomery to that question?

A. "No," because all the other things, syphilis and so forth—

Q. Did she have nervous prostration?

A. Did she have nervous prostration?

Q. Yes. [152]

A. Yes, I would consider that she had a—or a tendency towards what would be qualified as nervous prostration.

Q. Can you give us an unqualified yes or no answer with regard to this question: Did she or did she not have nervous prostration?

A. If you could explain to me exactly what you want to know by the word "nervous prostration."

Q. Well, what did you think it meant by the words "nervous prostration" in the application?

A. I think that "nervous prostration" means a wearing down of the nervous system just the same as you can wear down a knee with arthritis or a heart with overwork, you can wear down the nervous system.

Q. Is that what you had in mind when you and Mrs. Montgomery answered that question?

A. Yes, we felt that she had had (if that is what

(Testimony of John L. Montgomery.)

you consider nervous prostration); that she had had a wearing down of her nervous system.

Q. That is why you answered "No" to the question: "Have you ever had nervous prostration?"

A. I can't say that we meant—the "No" was intended to cover all of these things asked. "No" covered all these other things, but "Nervous prostration," being underlined, would indicate that she had had some nervous prostration.

Q. Would you take a look at question No. 27? Do you have [153] question 27 there?

A. 27, yes.

Q. What does that say?

A. "Have you had or have you ever been told you had or have you ever been treated for?"

Q. Is nervous prostration under there?

A. Yes.

Q. What is the answer to that question: "Have you ever been treated for nervous prostration?"

A. There is a "No" after it with all the others.

Q. Doctor, there was a time subsequent to her being in the hospital that the children had to be put in boarding school; was there not?

A. Yes, we put the children in boarding school.

Q. Now, in connection with her condition in the spring of 1951, you called in a psychiatrist at the Holladay Park Hospital for what reason, Dr. Montgomery?

A. Would you repeat that, please?

Q. Why did you call in someone from the Hol-

(Testimony of John L. Montgomery.)

laday Park Hospital in the spring of 1951 to take care of Mrs. Montgomery?

A. As I recall, Dr. Cooney called in someone from there, and it was upon his recommendation.

Q. Did you feel that in your field of medicine that you were able to diagnose the scope of her condition? A. My field? [154]

Q. Yes.

A. No, indeed. I am very limited in my field. I am a radiologist.

Q. The same with Dr. Cooney?

A. Pardon?

Q. The same with Dr. Cooney?

A. Dr. Cooney felt it was out of his scope.

Q. Was she or was she not resentful of the doctor putting her in the hospital, Doctor? Was she resentful of doctors who put her in the Holladay Park Hospital? A. The first time.

Q. How about the second time? A. No.

Q. I call your attention, Doctor, to the hospital record signed by Dr. Cooney, notation 4-21: "Husband says there is still resentment about the doctor who sent her in." Now, I take it that would be incorrect?

A. I think that the resentment there at that time would have been towards Dr. Cooney but not towards — there was no resentment on her part about going into the hospital at that time. There were many doctors involved; not just Dr. Cooney.

Q. There were lots of doctors taking care of her, I take it?

(Testimony of John L. Montgomery.)

A. Well, Dr. Cooney had referred her, and we know from the records that there were many consultants on her. [155]

Q. Dr. Cooney did not perform the electro-shock therapy, did he? A. No.

Q. At the time she was first in the hospital, Doctor, did she have delusions?

A. Not to my knowledge.

Q. All right, did she have any delusions the second time she went into the hospital?

A. Possibly even on the first question I should have requested again to go into what you mean by delusions.

Q. Did she have a delusion about her sister and mother-in-law, that they had tried to keep her in turmoil, had told lies about her and had tried to upset her and wreck your practice?

A. Yes, if that is what you mean by delusion.

Q. How about the second time, Doctor?

A. Did she have delusions the second time?

Q. Yes. A. I cannot truthfully recall.

Q. Referring to specifically — I will give you some examples, and you can tell us whether she had delusions or not. Did she have delusions that a sermon at the church was directed toward her?

A. Yes.

Q. Did she have delusions that there was an armless war veteran behind her? [156]

A. I don't recall that one.

Q. Did she have delusions about throwing the children in the pit in the zoo?

(Testimony of John L. Montgomery.)

A. That is difficult to answer. May I elaborate?

Q. Surely.

A. Not throwing them in, I don't recall that after the incident, that she ever mentioned it again, but I remember we went to the zoo while she was feeling upset, and I lifted one of the children up so they could see in, and it frightened her. She screamed, thinking that the child was going to go in, but I did not interpret it that I was attempting to throw the child in, but I remember distinctly that it upset her. I don't recall her referring to it after that.

Q. Do you say that this condition is due to or connected with the menopause?

A. Do I feel that it was?

Q. Yes. A. Personally myself?

Q. Yes. A. Yes.

Q. Were you here when the Deposition of Dr. Coen was read? A. Yes.

Q. Do you agree with this statement then, that he could [157] not recall any reference to or connection between the menopause and her mental illness?

A. Yes, I recall that in his deposition.

Q. Do you agree with Dr. Coen? A. No.

Q. Did you ever discuss with Dr. Coen sending Mrs. Montgomery to the Twin Pines Sanitarium at Belmont, California or the Livermore Sanitarium at Livermore, California?

A. I don't recall discussing that with Dr. Coen; however, I might have discussed with him the pos-

(Testimony of John L. Montgomery.)

sibility of getting consultation back where I went to school just merely because I knew the man, and he might have countered with other various suggestions.

Q. You discussed her condition with Dr. Coen?

A. Yes.

Q. Did you admit the possibility of Mrs. Montgomery having been a schizophrenic?

A. I admit that as a possibility.

Q. Did you ever ask Dr. Dickel, Dr. Coen, or Dr. Cooney what was the matter with Mrs. Montgomery?

A. Do you want me to take them collectively?

Q. One at a time. Did you ever ask Dr. Dickel what was the matter with your wife? A. No.

Q. Did you ever ask Dr. Coen what was the matter with [158] your wife?

A. I don't recall it as a direct question in that order. I would have said that I discussed it with him on the telephone.

Mr. Gearin: I have no further questions, your Honor.

Mr. Davis: There was one question, your Honor, I wanted to ask him.

Redirect Examination

Q. (By Mr. Davis): Doctor, when you filled out this application form, did you know that your wife was diagnosed as a mentally insane person?

A. No.

Mr. Gearin: We object to that, your Honor. There is no contention made of any insanity.

(Testimony of John L. Montgomery.)

Q. (By Mr. Davis): Did you know that she was a schizophrenic paranoid?

A. I can't say truthfully that I knew that she was. I could not deny that I might have discussed it as a potentiality or a possibility.

Q. But in the over-all discussions that you had had with everybody involved in the thing in filling out this application form, based upon your discussions and everything, you had done your best to put down what you honestly believed what it was? [159]

A. Yes, because you understand that as an osteopathic physician and as medical physicians it is somewhat like the C.I.O. and A.F. of L. You don't always get along as institutions, but as individuals. Dr. Cooney was not on the staff, nor was I, at Holiday Park; therefore, in utilizing them as referring men there still is a wall, I mean, I was not privileged to walk in there and ask a lot of questions, and so a great deal of my thinking was channeled through the discussions with Dr. Cooney.

Q. There are here exhibits, the hospital records, Doctor. When was it that you first saw those hospital records? A. In your office——

Mr. Gearin: That would be immaterial, your Honor.

The Court: The question has been answered. There is no contention that he saw them anyway. The objection is sustained.

Mr. Davis: That is all.

Recross Examination

Q. (By Mr. Gearin): Is there any reason why

(Testimony of John L. Montgomery.)

you could not have asked Dr. Dickel what, in his opinion, was the matter with your wife?

A. Why I could not have?

Q. Yes.

A. Yes, because the case, as I understand, was not [160] referred to Dr. Dickel.

Q. Was there any reason why you couldn't have asked Dr. Coen what, in his opinion, was your wife's trouble?

A. There is no reason why I could not have.

Q. Why didn't you?

A. As long as the information was funneled to me through Dr. Cooney—

Q. Why didn't you ask Dr. Coen, the psychiatrist that was called in by Dr. Cooney, what was the matter with Mrs. Montgomery?

A. We discussed it on the telephone is all. We did not sit down and direct questions.

Mr. Gearin: That is all. Thank you.

Q. (By Mr. Davis): You did discuss it on the telephone, didn't you?

A. We discussed it on the telephone, yes.

Mr. Davis: That is all.

Mr. Gearin: That is all.

The Court: I think this is all the testimony, isn't it?

Mr. Davis: Yes, your Honor.

The Court: Do you have any rebuttal, Mr. Gearin?

Mr. Gearin: No, sir.

The Court: Ladies and gentlemen, please re-

(Testimony of John L. Montgomery.)

member, do not make up your minds as to how this case is to be [161] decided until you have heard the arguments of counsel and the instructions of the Court. You are now excused until ten o'clock tomorrow morning.

(Thereupon, the jury retired at 4:30 p.m. for the evening adjournment.)

(Thereupon, the jury having retired, John L. Montgomery was recalled to the stand on offer of proof and testified as follows:)

Direct Examination

Q. (By Mr. Davis): Dr. Montgomery, would you briefly advise how you happened to take out this policy for your wife?

A. Yes. Mr. Graham, the agent for Bankers, made many calls in my office trying to interest me in this type of thing over a period of months. Many other osteopathic physicians, he pointed out, in the State of Oregon, some of whom I knew and some of whom I did not, had utilized his company. Eventually we got to a place where my wife and I felt that we should increase our policies or savings, thinking of retirement, and we picked as a figure \$30,000. Mr. Graham then brought in this policy, and we discussed the phases of it, and it was primarily a policy for retirement. It, of course, had a life insurance feature added to it. He then suggested to me that several other doctors that he had sold this policy to had split the [162] premiums with their wives in that it was primarily for your

(Testimony of John L. Montgomery.)

mutual benefit and retirement, that you could take advantage of the fact that the premium would be cheaper with your wife being younger and a woman because insurance rates are lower both on women and younger individuals.

Q. Go ahead.

A. We discussed it at home and decided that that would be worth consideration and told Mr. Graham to write the policy in that manner so he wrote the policy for \$15,000 apiece on both of us with the retirement age at age 65 when we would receive "X" number of dollars. Because we were both young and traveled and because we had children, he recommended that we consider the double indemnity factor, and because it was not a great deal of addition we both took the double indemnity factor, meaning then that we had each \$15,000 retirement policy with a double indemnity factor, and this gave us the advantage of a cheaper premium.

Mr. Davis: That is all.

The Court: The offer is rejected.

Mr. Davis: At this time, your Honor, could I make part of the record, this is an addition based upon this morning's statement by Mr. Gearin. I didn't make a record of it at all, but it is my understanding the Court is going to permit Mr. Gearin to have the opening argument and also the closing argument? [163]

The Court: That is right.

Mr. Davis: At this time I would like to take exception to the Court's ruling on that because

merely by coming in and admitting some parts of the allegations and then permitting them to have the opening and closing would put them in the same position as a plaintiff in bringing this action.

The Court: I think that the defendant has admitted the execution of the policy, and the burden of proof is on the defendant. Therefore, I am going to rule that since they have the burden of proof they can open and close.

Did you see the interrogatories that I left with both of you? Mr. Gearin, have you any objection to these interrogatories?

Mr. Gearin: Yes, sir, I think, your Honor, that the question with regard to listing names of the doctors is something that does not have to be wilfully withheld, but the fact if they have treated or consulted is a matter which, if they do not list the doctor, will be deemed to be legal fraud, and it does not have to be wilfully admitted. Other than that, I think they are all right with the exceptions of questions (b) and (c). There is no dispute but what the whole testimony is that the answers were material and that the defendant did rely upon them.

The Court: I do not know if they did or not. You are the one who submitted those. I took them right out of your requested instructions. You have six requested instructions, using the identical language.

Mr. Gearin: If those are in there, then I am in a poor situation to complain now.

The Court: I used your exact words.

Mr. Gearin: I did not know at the time the in-

structions were prepared as to what their testimony would be as far as materiality or whether or not we would rely upon it, and so I had to shoot everything. It was all blank. Now, since both parties have rested, I think I can state there is no issue for admission to the jury as to either items (b) or (c), of any of the interrogatories 1 to 4, inclusive.

The Court: I do not think that there is any question that the other doctors were consulted, but I am willing to give another interrogatory that asks if the interrogatory was correct. That is the plaintiff's view, that the interrogatory was answered correctly, and I am willing to submit that if you want that also.

Mr. Gearin: I think in fairness, your Honor, then if that is in, then depending upon what the answers are, we may present the matter again under—I have forgotten the name of the case.

The Court: That is Chandler vs. Mutual Life of New York. [165] Those cases look quite good, but I think the plaintiff has the right to have it submitted. Do you want me to submit 2 altogether, or do you want me to delete figure 2, or do you want me to ask that question also?

Mr. Gearin: I think figure 2 and (a) should be in there, your Honor.

The Court: Well then, if 2 (a) should be in there, what difference does it make if (b) and (c) are also answered because even if it is immaterial how can that hurt you? The only thing it can do, if they answer that it was material and that the

defendant did rely on it, that strengthens your position, doesn't it?

Mr. Gearin: That's right, but they might make a mistake.

The Court: Because if they answer (a) that it was wilfully false, under the Chandler case you may be entitled to prevail.

Mr. Gearin: Will your Honor give another one in 3, No. 29, asking was it true or false?

The Court: I did ask them that: Was the answer wilfully false.

Mr. Gearin: I don't think, your Honor, it has to be wilfully false in order for us to prevail. If it was false in fact, we are entitled to prevail. I am talking about interrogatory No. 3. [166]

Mr. Davis: I don't think interrogatory No. 3 should be in here on the basis of the others.

The Court: Why?

Mr. Davis: It says here, No. 29, "Have you ever been advised to have a surgical operation." That hasn't anything to do with it.

The Court: It uses the word in the disjunctive.

Mr. Davis: Yes, "Or have you ever consulted any physician for any ailment, not included in any of the above answers." Well, your Honor, in above, they listed above here nervousness and had the attending physician up here.

The Court: That is your interpretation, but their interpretation is that she failed to show in one of the answers psychosis and that, having so failed, she should have put it in down here.

The only one that I had difficulty with was No.

27. I was going, on the basis of the testimony, I was going to delete interrogatory No. 1, but the only reason I am now going to submit it is because of the testimony of your own witness. Dr. Montgomery indicated that he interpreted it. According to the company's own doctor, with the psychosis there was no place to answer No. 27. All right, I am going to give these interrogatories the way they are. [167]

Now, I am going to tell you what I am going to instruct. I am going to tell them that they are to answer certain questions, and these are the questions they are going to be asked to answer. I am going to tell them that the insurance company has the burden of proof. Then I am going to give them the ones about best evidence. Then I am going to tell them the questions contained in the application must be given their natural and normal meaning; however, if there is any ambiguity, that ambiguity must be resolved against the insurance company because it is the insurance company that prepared the application. However, that rule of construction only applies in case a question is ambiguous and not clear. There is an Oregon case, *Purell vs. Washington Life Insurance Company*, a case that Mr. Frank Howell tried, I think, and it says that the two constructions must be equally reasonable, and if they are, then the construction most favorable to the assured is the one that is to be used.

I am going then to instruct it is the duty of all applicants for life insurance or health and accident

insurance to truthfully and completely answer all questions contained in an application for insurance. In this case the evidence is uncontradicted that the plaintiff, an osteopathic physician and the husband of Anna Grace Montgomery, the applicant for the insurance, jointly [168] prepared the application, and therefore, not only must the answers truthfully and completely set forth all information requested of her in connection with this application, but it must also truthfully and completely reflect all the information of which plaintiff had knowledge at the time of the application. There is no objection to that?

Mr. Davis: No; that is correct.

The Court: Plaintiff and the deceased were bound not only to state truthfully what she, in fact, represented, but they were also obligated not to suppress or conceal any facts within their knowledge which materially qualified the statements made, for under the law a partial disclosure of facts accompanied by a wilful concealment of qualifying facts is not a true statement. Is there any objection to that?

Mr. Davis: Other than this, your Honor, it would have to be done wilfully, and it would have to be material. The Court will cover the material end of it, I assume.

The Court: A statement is made wilfully false if it was untrue when made and was known to be untrue by the person making it or causing it to be made and if the statement was made deliberately and of one's own choice. A statement is also made

wilfully false if made recklessly without regard to whether the statement is [169] true or false, and if such statement is, in fact, false.

These are the only instructions I propose to give in the case. I think they will cover it. Is there anything else?

Mr. Davis: We are satisfied.

Mr. Gearin: No. [170]

The Court: Do you want to make a motion for a directed verdict?

Mr. Gearin: I have submitted a written one, your Honor. I think for the sake of the record the defendant moves the Court for an order directing the jury to return its verdict against plaintiff and in favor of defendant on the grounds and for the reason that it affirmatively appears without question that the plaintiff and the deceased, Anna Grace Montgomery, at the time of the application for insurance to the defendant, made answers in the application which were made false, wilfully false, and with regard to the answer requesting the names of doctors who had been consulted for any ailment as set forth in question No. 29, the names of the doctors were not filled in, and even though that may not have been done wilfully, it amounts to legal fraud vitiating the policy.

The Court: I am going to take it under advisement. Is there any other instruction that you think should be given?

Mr. Davis: I think the ones that you have read are sufficient and which I will argue about.

The Court: That is perfectly all right. That is

the reason why I have told you what the instructions are so you can gauge your argument accordingly. [171]

Mr. Davis: Let me say this, your Honor, I assume it is not necessary to reserve our rights. The Court has advised us you are going to submit interrogatories to the jurors, and we do take exceptions to that.

The Court: You may have an exception. Is there any other exception that you think you want to have?

Mr. Gearin: Your Honor, I would not make objection to any instruction that your Honor gives since you have advised us what they are. I think they fairly present the issues as long as the matter is being presented to a jury; however, I think, your Honor, since we have just got these interrogatories a little while ago, I would like leave to present to the Court another interrogatory along the lines of No. 3 to ask only if the answer was true or false. Under the Chandler case, your Honor, they might think they have to make it wilfully false, and they may want to find they made it inadvertently or something like that.

The Court: Do you want to do that on 3 and 2 both or just on 3, or do you want to do it on all?

Mr. Gearin: No, I think, your Honor, to be fair it only applies to the names of doctors. I think it would unduly confuse the matter if we asked it for all of them because I think you have to show it as wilfully false insofar as the other items are concerned. [172]

The Court: You just want 29 (a), "Was such answer false?" (b) "Was such answer wilfully false?"

Mr. Gearin: That would be fine if we could have it that way, if it can be just typed in above.

The Court: No, we will do that over. Mr. Davis, what have you got to say?

Mr. Davis: Your Honor, as I said, we object to 29.

The Court: I know that, but I think under the Chandler case he is entitled to that, except doesn't the Chandler case use the language of wilfully false in connection with fraud? Don't they say that fraud is imported by the failure to use that language?

Mr. Gearin: I think the words are it amounts to fraud.

The Court: Legal fraud.

Mr. Gearin: The fact that you do not disclose amounts to fraud, that fact in and of itself.

Mr. Davis: I think the Chandler case says that, your Honor, but that Chandler case has to be considered, the doctor took this man's tonsils out, and here he is over here taking treatments for tuberculosis, and although the Court said the man didn't know that he had tuberculosis so we won't consider that, yet, he knew within his mind that there was a doctor over here treating him for tuberculosis, your Honor. [173]

The Court: You can argue all you want that Dr. and Mrs. Montgomery answered this question honestly and correctly because you have got a question

about the treating physician, and you can also argue the two methods of construction, but that is not the point. I think he is entitled to have his theory of the case presented to the jury. If you get a judgment here, you want a judgment that is going to hold up.

Mr. Davis: I sure do, but I want to try to at least get a judgment, your Honor.

The Court: The jury is not going to make very much difference between false and wilfully false, I think.

Mr. Davis: I think that is right.

The Court: I think he is entitled to have it. I am going to put it in. Three will be, "Was such answer false?" Then I am going to give the other three. We will recess until tomorrow morning at ten o'clock.

(Evening recess taken.) [174]

December 10, 1957, 10:00 a.m., Trial Resumed

The Court: Ladies and gentlemen, all the testimony having been admitted yesterday, we will now hear arguments by counsel and instruction of the Court. Mr. Gearin.

Mr. Gearin: If the Court please, ladies and gentlemen of the jury, the case has been rather short, and the evidence, I think, is fresh in your minds, and I will not dwell upon the evidence.

The first question you must decide is what was the condition of Mrs. Montgomery, and I think the evidence satisfies you, from the doctors to whom she was referred, that her condition unfortunately was a mental illness. She had been diagnosed by

the psychiatrist in charge who had seen her at Holladay Park Hospital, as schizophrenic, paranoid. There is no doubt about that. No one seriously contradicts the opinion of the psychiatrist or of the hospital records. The hospital records show, and I do not think it will serve any purpose to review it at great length, the unfortunate situation in which Mrs. Montgomery found herself. Although this is not a proper thing for a doctor to discuss, it is one of those things that I think you will be satisfied from all the evidence that the company, before it insured the lady for the \$30,000 had a right to know about. This was not a nervous condition. Dr. Cooney and Dr. Montgomery felt that the situation was [175] so unusual, it was so serious, that they were not able in their profession to take care of her. They had to send her by ambulance to the Holladay Park Hospital. You will find on seeing the hospital records that she was to be placed under restraint, if necessary; that she was in the Psychiatric Ward with the doors locked. She had to have electric shock treatments. Now, her health at the time was serious, a serious mental illness. I do not think there is any question about it. Again I say it was nothing of a nervous nature because if it had been Dr. Cooney would have been able to take care of her.

Dr. McGee performed no neurological examination. He performed no—I mean, no mental examination at the time of the application for the policy. The company had no knowledge of her condition. It is true that Dr. McGee himself from his

social acquaintance with the Montgomerys knew that she had been to Holladay Park Hospital, but his knowledge on the outside certainly cannot be charged to the company because he did not tell you that question was ever discussed between him and Mrs. Montgomery, the question of doctors. We know that she was treated by Dr. Coen, Dr. Dickel. They were her treating doctors. Dr. Cooney had been merely the originating doctor. It is the same situation as if you go to your family doctor, and he says, "There is something the matter with you. I [176] don't know what it is. I am going to send you to a specialist," and the specialist finds out, and he tells you and your family that you have a cancer. It is serious. You go to the life insurance company and you say — they ask you, "What doctors have you seen?" You say, "I saw only the family doctor." I think that all of you would feel, to be fair, that you should have told the company, "Well, I go to the family doctor, but he sent me to a specialist, and the specialist made these findings."

Now, I say again this was not a nervous condition. Neither was it a condition associated with the menopause because Dr. Coen when he testified by deposition, you will recall at that time said he has no memory, no record of any association between the two.

The next question is: Did the deceased, Mrs. Montgomery, know this. We know that there was some sort of an understanding or agreement or some discussion between Dr. Cooney and Dr. Montgomery to keep the true nature of this from Mrs.

Montgomery so she wouldn't become more disturbed. However, she did know that she was in a Psychiatric Ward at the hospital, and, according to the records, she had a great resentment for the doctor that sent her in there. She knew she was taking shock treatments. She knew that is the place where she was. According to Dr. Montgomery, she said she finally found out the [177] people were there for the same thing that she was.

The next question: Did Dr. Montgomery know about this? Certainly he did. He knew that the thing that bothered and troubled his wife was beyond his ability to cope with. He knew although, as I say, he has had general practice, he was in charge of a hospital at one time, it was also beyond the ability of Dr. Cooney, the family physician. He talked to Dr. Coen, the psychiatrist. Her condition was discussed, and he admitted the possibility that she might have been schizophrenic.

The question is: Did the applicant and did Dr. Montgomery make a full, fair, and honest application to the company? Did they come forward in good faith and say, "Well, we have had the family doctor, and there is something we think you ought to know."

You will have certain interrogatories, certain questions and answers that you members of the jury are going to be called upon to answer yes or no; true or false. You will have the application, and it is very obvious to me that there was no full disclosure.

Another item in this case that you are going to be

called upon to answer is whether or not this was material, whether the company relied upon the representations made. Of that there is no dispute. Dr. Lee's testimony has been taken, and he has told us by deposition that had the [178] company known that, certainly a policy would never have been issued.

So the real question is: Were the answers true or false, and on that I am not going to argue any longer because I think that inside the mind and heart of the impartial individual there can be no question that something was concealed, something was held back.

Then the fourth part of my address to you, and it is really not an argument, I don't feel that an argument is necessary, I just want to review these facts with you, and that is the question why? Now, that is always asked in a case because it has some bearing upon the motive. Why was the application made out this way? I am not going to tell you or make any personal accusations against Dr. Montgomery. Certainly the illness of his wife was something that was very unpleasant. It was something—it was a family tragedy, that is what it was. There is no question about it, the mother of two children having a serious mental illness, the children in boarding school and she having to be placed under restraint, if necessary, but we know this, and I think this is very important. The reason why the application was executed the way it was, we know from Dr. Cooney's testimony that they tried to conceal from Mrs. Montgomery her true condition. She must

have had some inkling about it. Dr. Cooney told us [179] that she made the first diagnosis herself, and she was worried about the condition that her two sisters had been in.

Now, Dr. Montgomery had the application. He took it home, and he and Mrs. Montgomery filled out the application. Is it not reasonable to assume that under those circumstances Dr. Montgomery did not want to put on the application in front of his wife the true fact that she was suffering from this mental illness? We know that they tried to keep that from her, and then when they had the application home and he was going over it, you can see the natural reluctance that he as a husband and father of her children would have to put down, say to his wife, "Honey, we have got to put down here that you have been mentally ill." He couldn't do that. That is the reason why, I submit, that was not done. There is no question that Dr. Montgomery knew that his wife, something serious was the matter with her, because his profession could not handle it. We know that he wanted to conceal it from his wife, and to do that necessarily he had to conceal it from the company because they made the application together.

Now, that being the case, we think that it is not fair; it is not just, but, to the contrary, the only true verdict that you can reach is that the material facts were withheld, were not correct, and it was done [180] deliberately. The motive for it I have tried to explain to you, and I think that is a reasonable motive to take, but, certainly, the company

should not be held responsible because the company did not know of her true condition, and the company would not have issued a policy. When the true facts became known, a refund of premiums with interest was made, and I think that is just where we ought to leave it.

This is an unfortunate family tragedy, but it is something that the company should not be compelled to pay because it did not know the facts, and the reason it didn't is because, I submit, that the doctor did not want to fill out the application with his wife and have it down in black and white in front of her that she was suffering from this serious mental illness of which there is no dispute whatsoever. Thank you.

The Court: Mr. Davis. [181]

Mr. Davis: If your Honor please, ladies and gentlemen of the jury, during the course of this trial I felt it, and I am sure that you felt it—there are two things that I felt, but one of them was this, that we were on the defensive some way. How we got on that defensive I don't know, but when we filed this lawsuit it was filed in court, and the answer set up and the issues brought up, and we were the plaintiff. You have been on juries before where the plaintiff goes ahead with his case, and he takes the offensive in the case, but in this case it has now developed so that there is the admission of an insurance policy, there is the admission of everything. There is the admission of accidental death. Everything has been admitted, and based upon that, the insurance company takes over the

burden. Judge Solomon is going to instruct you on the burden of proof and the duties of doctors, but yet, as I have sat here and the witnesses have all come in here, suddenly they were coming for the insurance company, and I felt that we were on the defensive. We are not on the defensive, ladies and gentlemen; we are not on the defensive at all. We are still on the offensive. We feel we are right, and that is why we brought this action up in court, suing for this insurance policy. I believe that you all agree that we have the right to do it if we feel we are right, and if we are wrong you are going to tell us. [182]

That is one feeling I have, and another feeling is this, and I couldn't quite determine what it was but there seemed to be something lacking, something—well, I don't know, I think of the word "cold" and no warmth to it, no personality to this case. Something was lacking, and I couldn't figure why, but do you realize, I think this will be the only case you will ever sit on that all the witnesses including the depositions, all six witnesses were doctors. I am not critical of doctors. I haven't any criticisms at all, but doctors deal in life and death. Everything is a matter of fact to them when they talk about things, but we feel a certain amount of warmth to it. The doctor takes it as a matter of fact.

On the witness stand I believe that every doctor and everybody has testified truthfully here to the best of their ability, but they were talking to you and they were talking to me in a field like, well, this was not a nervous condition or this was not from

the central nervous condition, this was an organic thing, things of that nature, and I think for that reason there was a sense of frustration as far as I was concerned, and I think you noticed it in my examination and the impatience I had to show to you that we are right.

Those are two things, but I want to get down to what Mr. Gearin has said, that he feels the reason why [183] this policy was filled out falsely, the Court will instruct you it has to be wilfully false; it has to be a deliberate intent to defraud this insurance company and something that we have done wilfully, wrongfully, or so recklessly as to be wilful or wanton.

Put yourself in the position of, I think, Dr. Dickel. In my opinion, he testified that if he was filling out this application form what he would have done himself personally as a psychiatrist, what he would have filled out, and when you go to the jury room I wish you would look at these and study them. Look at this insurance policy. This is not just an ordinary life insurance policy. It is a policy which has a Twenty Pay Life, and I think all of you know what that is, and there was a retirement feature, a program that is something—you will notice up there the amount; you will notice the premium that was paid for it. It was based on twenty years paid up, on twenty years retirement basis. It was not a straight life like we think of a straight life insurance policy. The reason I bring that up, why take out that policy if you are going to wilfully intend to defraud the insurance company?

Why not just take out a straight life insurance policy if you are going to do that? When you take this policy in with you and these applications with you which are attached to the policy, you will notice when you look this policy over [184] on the second page where it says, "Entire Contract," I would like to have you read that. Take this application form that was filled out by Mrs. Montgomery and the doctor, and you have heard it many times. We have talked about it many times and we have gone over it many times, but this application form, it involves basically this one point up here which lists the various elements under one section——

The Court: I have a telephone call from Los Angeles. Is there any objection if Mr. Davis talks without my being present?

Mr. Gearin: I would prefer to have the Court here.

The Court: All right.

(Short recess taken.)

Mr. Davis: Mr. Gearin has said he couldn't hear me, and I may speak up a little louder just for Mr. Gearin's benefit, but I wanted you to look at this application form. We have talked about it a great deal, and I want you to do just exactly as Dr. Montgomery and Mrs. Montgomery would do, to put yourself in the same position. I do not want you to think that I am quibbling with words or quibbling with anything. I just want to have you look at this application form and see if Dr. and Mrs. Montgomery did something that was wilfully false with an intent to deceive this insurance com-

pany. Right under here they have [185] underlined nervous prostration. You have seen it, and you will see it underlined here. They put the word "No" down. Well, you don't want to admit to having epilepsy, syphilis, mental derangement and everything else. They have underlined that, and they brought it to the attention of the insurance company, and there it is, nervous prostration.

Dr. Dickel himself, who is a trained psychiatrist, who had seen Mrs. Montgomery and had gone through the records, said that if he was doing it personally himself he would mark nervous prostration, and I leave it up to you what you would have marked or what you would have done to bring it to the attention of the insurance company.

Down in here they mark the words "nervousness, two years ago." Now, actually, ladies and gentlemen, it had been three years and six months before, and the longer you have been out of treatment or the longer you have been out of a hospital the better risk you are for the insurance company. It is a better risk. I realize that; we all realize it. An insurance company couldn't cover everybody that had cancer. They can't do those things. It's a question of risk that is involved. It is a question to avoid people from deliberately, as Mr. Gearin said to you, a person that is dying of cancer, their first thought is to protect the family, [186] and a man that knows he is dying of cancer may go on and do it to try to protect his wife. They are not entitled to have insurance coverage at that time. We all know that, but did Mrs. Montgomery—did they feel, was

there any contention that she was a bad insurance risk? Did they do anything deliberately, or did they do anything wilfully? Did they intend, and did they know that Mrs. Montgomery was going to lose her life in an accident? Did they know any of these things? Was it a question of defrauding the company? It is a question of risk.

It says here two years ago, and if they had put three and a half years ago like it would have been, she would still have been a better risk, but they put two years. I don't know why unless this, that she had made a good, an excellent recovery. It says, "Results," and Dr. Joseph Cooney it says under, "Name of attending physician." It doesn't say, "Name the attending physician and name all the consultants." It says, "Name the attending physician," and if they want to check with Dr. Cooney or ask him about this, there it was.

Now, if they wanted to defraud this company, if they did this deliberately and wilfully, like the Court will instruct you, why even put nervousness down or why even mark nervous prostration or why even put Dr. Cooney's name there. They don't know whether they [187] would have contacted Dr. Cooney. The hospital records are there. There isn't any place in this application that says, "Have you been depressed within the past ten years?" There is nothing in here.

Now, the next question that they ask is this, and I want to read it to you, it is right underneath this part where they filled in the nervousness: "Have you ever had or been advised to have a surgical

operation or have you ever consulted any physician for any ailment, not included in the above answers?" They put it down there, ladies and gentlemen. It is our contention that they gave full notice to this insurance company. If you do not think so, then we are not entitled to a verdict, if you think we have done something that has been wilful and wrong, but I don't want you to get the feeling that we have been on the defensive, it is not right, but I have gotten that feeling just by — Mr. Gearin has done a wonderful job in the presenting of this case to present us as if we have done something wrong to be here in court. I do not think that is right, and that is why I want you to look this over and study it.

This insurance company made no effort to check with anybody. They didn't check with Dr. McGee, with Dr. Cooney, or anybody else. They just said, "No, we are not going to pay this client." [188]

Dr. McGee filled this out, that portion here. Did Mrs. Montgomery, did Dr. Montgomery know she was going to die in an accident? Did they expect her, that she was going to have a short expectancy of life? Does it mean that every person that has had a nervous breakdown or a woman that has had trouble, does that mean that her span of life is limited? Does that mean that every person in the insane asylum will never get well? Does that mean that their risk is extra and any woman because she has had shock treatments she is through for life; she cannot get insurance? I don't think so. I don't think Dr. Lee from Denver, who was a physician

and surgeon of the corporation and naturally has an interest, would say that. He agreed in his deposition that he couldn't say it was mental derangement or nervous prostration. He said he couldn't say, but yet what they want you to do, to put down mental derangement here when they know she was not mentally deranged. It was not an organic thing.

Do we have a duty, ladies and gentlemen, to write back here, write a letter and say, "My wife was in the hospital for two weeks. She had had a nervous breakdown, and she had had shock treatment?" The Court will say there is no duty except to fill out this application as honestly and as truthfully as you can. If we did not do that, we are not entitled to recover. We should [189] not be in court. But I say this, that, in my opinion, after you have looked this over, that the insurance company has acted arbitrarily, and they have refused to pay something because their application probably is not appropriate. If they would put in here, "Was there a diagnosis or a possibility that you have schizophrenia, paranoid," do you think that Dr. Montgomery would have not put that in? Why did he want this policy? What was the purpose of it? The purpose was not for her death, to be unjustly enriched because he had knowledge that nobody else knew about. That was not the purpose of it. You read this policy, and you will understand by that.

It is an unfortunate tragedy. It may be that you are not satisfied, and all I can say that I felt about the doctors, all I can say is this, that, as I said before, if you had to be in court yourself and you

had to go through this when you feel you are entitled to it, maybe altogether you would not be the best witness, and I feel the doctors in a way, in going over this whole case, I don't know if they described it to you or not, but I can say that Dr. Dickel in his fairness and in his honesty and what he knew about it, I think he told you the story.

We have the policy, but I don't mean to argue. You have heard all of that. Mr. Gearin will have a chance to answer all my arguments. I know he will do an [190] excellent job, but I still hope you will feel we are in court and have the right to be in court and why we feel that the insurance company has the duty to pay this claim. Thank you.

The Court: Mr. Gearin. [191]

Mr. Gearin: I am going to answer very briefly the argument that Mr. Davis has made to you.

First of all, he mentioned the witnesses. The witnesses were practically all called by us because we wanted the full facts to be brought before the jury. The only doctor witness we did not call was Dr. McGee who did not make the neurological examination, did not make a mental examination, and could not remember, because of the passage of time, questions and answers that were made and conversations that he had with Mrs. Montgomery. The witnesses do not belong to anybody. You are to decide this case on all the facts from both sides fairly and impartially.

Mr. Davis complains that there was no warmth in this case. We are asking you to decide the case not upon any feeling of warmth because the sym-

pathies anyway are all with Dr. Montgomery even if it were not for the fact he was sharing on the insurance policy. We are asking you to decide this case on the cold facts impartially and without any warmth of feeling, passion or prejudice for or against an insurance company or corporations or defendant's ability to pay or anything like that. We ask that you decide the questions that will be propounded to you coldly, impartially, and fairly.

Now, about Dr. Dickel. Dr. Dickel was a trained [192] psychiatrist. Certainly, since he admitted that the lady had a mental illness, he certainly would have put something down in the application to put the company on notice. He certainly would have told about the doctors because one of the questions that you are going to have to ask is the question which calls for the doctors that the applicant has consulted, not treated. You will find the word "consulted." That is what the company wants to know. For example, Dr. Burke was the attending physician for a year when Dr. Cooney had his heart attack. Dr. Coen was the only doctor outside of Dr. Dickel—neither of their names were mentioned—who treated the lady in the hospital. They had sole care of her. We were not advised of that. Now, if it was nervous prostration, if it was, they answered No to the question. If it wasn't nervous prostration, we have asked, "Have you consulted any physician for anything that you have not told us about before?" And the answer is No, plain and simple. It is a No answer. For example, the question 27: "Have you had or have you ever been told you had

or have you ever been treated for—” and they list epilepsy, mental derangement, nervous prostration, syphilis, paralysis, convulsions, fainting spells. The answer is No. They could have put Yes, nervous prostration. They say in the next question Nervousness. Is this [193] nervousness? We all know that people get nervous, but nervous people don't have some serious mental illness that requires hospitalization and attention of Dr. Coen and Dr. Dickel.

Next: “Have you ever had or been advised to have a surgical operation or have you ever consulted any physician for any ailment, not included in any of the above answers (if yes, give full particulars).” They could have written there Holladay Park Hospital; yes, Dr. Coen; yes, Dr. Dickel.

Next question: “Are there any additional facts or special circumstances known to you which might affect the risk of insurance on your life, and of which the company should be advised?” Dr. Montgomery is a doctor. He is entitled to practice in this state. He is a doctor. Is this so commonplace, is this so frequent, as counsel would have you believe, that it is something like having your tonsils out, appendix, something like that? No. This was serious, so serious, again I repeat, that Dr. Cooney and Dr. Montgomery felt it was entirely beyond their ability as physicians and surgeons to treat her. She had to go to a special ward in the hospital. The company, I think you will all agree, has the right to choose who it will insure and who it won't. I mean that is a personal matter. You pay a premium, and the agreement is if something [194] hap-

pens to you you are going to get \$30,000. The company has a right to accept you or reject you. It is the same way that you want to go and buy a radio or television set, you can go down and buy it if you want to. The company has the right to accept you as an applicant for insurance if you answer these questions. They have a right to rely upon the answers that the applicant makes, and we are criticized because we didn't go and check with Dr. Cooney. According to the application, there wasn't anything that would affect the risk, and Dr. Lee told you that. He said on this everything appeared to be in order, and one of these, it said nervousness before and after surgery, but lots of people are nervous before they are operated upon, and lots of people are nervous after, but we are not even talking about that. We are talking about what Dr. Dickel admitted was mental illness. That is what we are talking about, and the company has the right to be fully advised, and the applicant is under an obligation to lay his cards on the table and say, "Well, I think I am in pretty good shape. I think you ought to know this." It is not being unfair to require that the applicant make a full, honest, and open disclosure. They don't claim any mistake or anything like that. They said, "We said Nervousness." That includes a serious mental illness, has been diagnosed as schizophrenia, paranoid, which is [195] serious, and it is something that does not happen to many people, and it is something which we feel in all honesty that they should have told the company about.

Thank you very much. [196]

Instructions to the Jury

The Court: Ladies and gentlemen of the jury:

Unlike most of the cases in which you have sat as jurors, you will not be called upon to return a general verdict either in favor of the plaintiff or the defendant, but you will be called upon to answer certain interrogatories that I propose to submit to you.

As I told you at the commencement of this trial, the insurance company admits that it issued the policy, but it claims that it is not liable thereon by reason of certain false statements made by the deceased and her husband, the plaintiff in this case, in their application. Therefore, the defendant insurance company has the burden of proof; that is, it must prove the various questions that I will propound to you, by a preponderance of the evidence.

Preponderance of the evidence does not mean the greater number of witnesses but the greater weight and the convincing character of the evidence that is introduced. In other words, you are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your mind, as against the lesser number or against a presumption of law or evidence which satisfies your mind. The direct testimony of any witness to whom you give full credit and belief is [197] sufficient to establish any issue in the case. Every witness is presumed to speak the truth. This presumption, however, may be overcome by the

manner in which he testifies, the character of his testimony, or by evidence affecting his character or motives or by contradictory evidence. If you find that a witness has testified falsely in any one material part of his testimony, you should look with distrust upon the other evidence given by such witness and, if you find that any witness has wilfully testified falsely, it will be your duty to disregard entirely all evidence given by such witness unless it is corroborated by other evidence which you do believe. The testimony of a witness is said to be corroborated when it is shown to correspond with the testimony of some other witnesses or comport with the facts otherwise known or established by the evidence.

The rules of evidence ordinarily do not permit a witness to testify as to his opinions or conclusions. An exception to this rule exists in the case of an expert witness. A witness who, by education, study and experience, has become an expert in any art, science or profession, may state his opinion in a matter in which he is versed and which is material to the case, and he may also state the reasons for such opinion. You should consider each expert opinion received in evidence in this case and give [198] it such weight as you think it deserves. Such opinion will be judged upon the same basis as you would judge the opinions of lay persons who have testified, except that you are entitled to give it more weight if you decide that, because of the experience and training of the expert, his opinion is more likely to be accurate than that of an untrained per-

son. You may reject the opinion of an expert witness entirely if you think the reasons given in support of it are unsound.

Any fact in the case may be proved by direct or indirect evidence. Direct evidence is that which tends to prove a fact in dispute directly without any inference or presumption and which, in itself, if true, conclusively establishes the fact. If a witness testifies to a transaction to which he has been an eyewitness, that is direct evidence. Of course, you have evidence of that kind in this case. Indirect or circumstantial evidence is that which tends to establish a fact in dispute by proving another and which, though true, does not in itself establish a fact but affords an inference or presumption of its existence. That evidence is also before you in the exhibits and in the testimony of the doctors given concerning the condition of this woman, the treatments that were given. You also have that kind of evidence. It is, however, indirect evidence. Sometimes, [199] indirect evidence may be stronger, on account of the inferences which may be drawn from it, than the testimony of eyewitnesses.

You should look with caution upon the oral admissions of a party as that kind of evidence is subject to mistake. The party himself may be misinformed or may not have clearly expressed his meaning, or the witness may have misunderstood the party.

You will have with you in the jury room these interrogatories. As I have said before, these interrogatories are to be answered honestly and fairly,

without sympathy, bias or prejudice either for or against the plaintiff or the defendant. You are not to figure out on the basis of these interrogatories how they will affect any judgment that might be entered. The interrogatories read:

“We, the jury, make the following answers to the special interrogatories submitted to us relative to the application filed by Anna Grace Montgomery with the Bankers Union Life Insurance Company”: Interrogatory No. 1, and that is in the center of the page, as follows: Item 27 which was taken from the policy and reads:

“Have you had or have you ever been told you had or have you ever been treated for:

‘(e) Epilepsy, mental derangement, nervous prostration, syphilis, paralysis, convulsions, fainting spells? No.’” [200]

Then you are asked to answer these questions Yes or No:

“Was such answer wilfully false?” Answer Yes or No.

“Was such answer material?” Answer that one Yes or No.

“Did the defendant rely on it?” Answer that one yes or no.

The questions contained in the application, that is, “Have you had or have you ever been told you had or have you ever been treated for: And these lists of items as well as the other statements appearing in the application about which you will be asked, these questions or statements contained in the application must be given their natural and

normal meaning. However, if there is any ambiguity in the meaning of any question or statement, that ambiguity must be resolved against the insurance company because it is the insurance company that prepared the application. Likewise, words and statements susceptible of two reasonable constructions should be given the one most favorable to the applicant. However, this rule of construction only applies to statements or questions that are ambiguous or not clear. Do I make that perfectly clear to you? If the statement is clear, you will give it its natural and normal meaning. If the statement is ambiguous or [201] is susceptible to two reasonable constructions, you give it the construction most favorable to the insured. That is, you construe it against the insurance company.

It was the duty of all applicants for life insurance or health and accident insurance, including the insurance that was applied for in this case, to truthfully and completely answer all questions contained in an application for insurance. In this case, the evidence is uncontradicted that the plaintiff, that is, Dr. Montgomery, is an osteopathic physician and was the husband of Anna Grace Montgomery, the applicant for the insurance, and that they jointly prepared the application. Therefore, not only must the answers truthfully and completely set forth all information requested of her in connection with this application, but it must also truthfully and completely reflect all the information of which the plaintiff, himself, had knowledge at the time of the application.

Plaintiff, that is, Dr. Montgomery, and his deceased wife were bound not only to state truthfully what she, in fact, represented, but they were also obligated not to suppress or conceal any of the facts within their knowledge which materially qualified the statements made, for under the law a partial disclosure of facts accompanied by a wilful concealment of qualifying facts is not a true [202] statement in these questions, we asked in most of them was the answer wilfully false. In one of them we merely asked was the answer false.

I want to define the word "wilfully" to you. A statement is made wilfully false if it was untrue when made and was known to be untrue by the person or persons making it or causing it to be made, and if the statement was made deliberately and of one's own choice. A statement is also made wilfully false if made recklessly without regard to whether the statement is true or false, and if such statement is, in fact, false.

These are the rules by which you are to determine the Interrogatory No. 1 which I read to you, and they are also the rules which you are to use in determining your answers in Interrogatories No. 2, 3, and 4 which I will now proceed to read for you.

Interrogatory No. 2, the statement is:

"Name below all causes for which you have consulted a physician or healer in the last ten years; give details: (Include also particulars of any 'Yes' answer to question 27.)"

I might also instruct you that you are to consider

these questions in relation to each other, but each question is to be answered separately although some of the evidence which may affect one set of [203] interrogatories may also affect another set of interrogatories. I will not read the answers to that statement No. 27, but I merely want to say that you are going to be asked three questions there again: Was such answer wilfully false; was such answer material; and did the defendant rely on it.

Interrogatory No. 3 says:

“Have you ever had or been advised to have a surgical operation or have you ever consulted any physician for any ailment, not included in any of the above answers?” The answer, as you recall, was “No.” You are asked to answer four questions: Was such answer false; was such answer wilfully false; was such answer immaterial; and, did the defendant rely on it.

Then Interrogatory No. 4, the statement is:

“Are there any additional facts or special circumstances known to you which might affect the risk of insurance on your life, and of which the company should be advised?” The answer there was “None.” You will be asked those three questions: Was such answer wilfully false; was such answer material; did the defendant rely on it.

In the Federal Court all answers must represent the unanimous opinion of each of the jurors so I want to admonish the foreman, whoever he or she may be, to make sure that each of the answers represent the unanimous [204] opinion of each of the jurors.

I urged you before not to talk about this case with anyone else and not to discuss it with anyone, even among yourselves, until the case is submitted to you. That time is about here, and, of course, we expect you to discuss each interrogatory fully and give it such answer as you believe is right and just under the evidence submitted in this case.

I think some of you have sat on juries before when I have told you it is usually better not to go into the juryroom and announce emphatically that, "I am for all Yes answers," or, "I am for all No answers," and, "We are going to decide this case for the benefit of the insurance company or for the benefit of the plaintiff and let's figure out how these things can be done," but it is usually better not to make an emphatic announcement right away because, under those circumstances, individual pride may cause one to be reluctant to recede from a position which that juror has emphatically announced. So the only thing I tell you is discuss the matter and keep an open mind, and on the basis of your discussions and the evidence come to correct verdicts. What you find is correct obviously will not satisfy both the plaintiff and the defendant, but that is not your responsibility. Your responsibility is to make a decision [205] based upon my instructions and the evidence.

Are there any exceptions to the Court's statements?

Mr. Davis: No, your Honor.

Mr. Gearin: No, sir.

The Court: I asked you here, but if you want

to make exceptions you can do it outside in view of the fact that we had discussed this matter before.

You will have with you not only this form of verdict, but you will have with you the exhibits in the case. Swear the bailiff.

(Bailiff sworn.)

The Court: In view of the length of these interrogatories, do either of you have any objection if I give them an extra copy to go into the jury room?

Mr. Gearin: No, sir.

Mr. Davis: No.

(Thereupon, at 11:10 A.M., the jury retired to the jury room for deliberation.)

(The jury having retired to the jury room, the following proceedings were had:)

The Court: If there are any exceptions, we will hear you now.

Mr. Davis: The only one I had, your Honor, I took [206] last night—I presume that is for the record—was the Court submitting the interrogatories, and then my only thought was this, your Honor, that the Court did submit the interrogatories and then tied the instructions in with the interrogatories, and if the Court would permit me an exception to that.

The Court: Certainly, you may have your exception. First, you are again excepting to the fact that I am submitting interrogatories rather than a general verdict?

Mr. Davis: Yes, sir.

The Court: Secondly, you are excepting to the fact that I discussed the instructions in relation to the specific questions in the interrogatories?

Mr. Davis: Yes, sir.

The Court: You may have your exception.

Mr. Gearin: I do not make any objection to the Court's instructions; however, I think I indicated to your Honor last night that it is the position of the defendant that there was no issue of facts to be submitted to the jury, one or any, with regard to the materiality of the answer or the reliance of the company thereon, and probably that will be moot by whatever answers are given, but it may become important, your Honor.

The Court: It may be because this jury, I might tell you now, answered interrogatories of this kind, almost [207] identical interrogatories, in connection with another insurance case, finding the answers given but that the company did not rely on them. They found that the questions were given; that they were not material, and that the company did not rely on them.

Mr. Gearin: Well, I want to protect my record.

The Court: Yes, you can protect your record. There is basis for your inquiry.

Mr. Davis: Mr. Whitely mentioned to me, I am sure there is a record of it, and that was the Court permitting the defendant to open and close the argument.

The Court: You have already had that. You do not have to take that now.

(Trial concluded.)

(At 3:00 p.m. the Jury returned with its verdict, and the Court having received the verdict and the Jury having retired, the following proceedings were had:)

The Court: Judgment may be entered on the verdict, and I am going to allow you \$5000.00 attorneys fees. Pursuant to the stipulation, I can do that without either evidence being taken or another motion. [208]

[Endorsed]: Filed Feb. 24, 1958.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS IN RE:
DEFENDANT'S MOTIONS TO SET ASIDE
THE VERDICT AND FOR A NEW TRIAL

Portland, Oregon, December 23, 1957.

Before: Hon. Gus J. Solomon, District Judge.

Appearances: Mr. Alan F. Davis, of attorneys for Plaintiff. Mr. John Gordon Gearin, of attorneys for Defendant. [1]

The Court: Mr. Gearin.

Mr. Gearin: This is a motion of the defendant, your Honor, first for judgment notwithstanding the verdict. In this case, your Honor, before the trial we submitted a memorandum authority to the Court, relying chiefly upon the Chandler case and upon the Comer case. I am satisfied that your Honor gave consideration to those, and we feel that

there is no other authority in this matter that we can give to the Court on that score. Suffice it to say, your Honor, that the credible medical testimony in this case disclosed affirmatively that Mrs. Montgomery had a mental illness. That is the testimony of the psychiatrist who attended her; that she had been confined to a hospital on two occasions, and she had been diagnosed as schizophrenic paranoid. The record further discloses she was taken on one occasion by ambulance to the hospital and that the hospital records indicate that in addition to sedations she was to be placed in restraint, if necessary. This indicates affirmatively a mental illness and cannot be considered, I do not believe, as a matter of fact, any condition of nervousness. I don't believe that the facts as shown justify the jury in returning that finding.

We know what the law is, and long argument would serve no purpose because I know your Honor has read the decisions, [2] and the evidence is without dispute as to the nature of the mental illness.

However, with regard to the alternative motion, and this is directed primarily to the discretion of the trial court, this, I believe, your Honor, is a case in which the jury went off the deep end and a case where it is obvious to all concerned. The plaintiff himself who was a doctor of some sorts, and I don't mean that disrespectfully, but his medical past was not in the field of psychiatry. He knew that her condition was such that neither he nor Dr. Cooney could treat it, and that is why she was confined to the hospital with this mental ill-

ness, and there is no question that it was a mental illness and not nervousness.

I think the verdict was against the greater weight of the evidence. It was something that I know came as a shock to me. I think it something that no person unless he were inflamed against the defendant or had some idea—I will come to the questions of specific errors in the admission of testimony later—that this could not have been fairly done because people know as a matter of common every-day knowledge that mental illness is something different and apart from nervousness. All human beings are to some extent suffering from nervousness, and I don't think you can make [3] the same statement with regard to a mental illness which has been diagnosed here again in medical terms as schizophrenia, paranoid type.

Now, we have in this case, your Honor, three contentions; one, Dr. McGee was permitted to testify, over our objection, that he knew that Mrs. Montgomery had been confined to the Holladay Park Hospital. That testimony, because of the nature of the pretrial order and counsel for plaintiff's statement to the Court that he was not relying upon estoppel or waiver and was not contending that the knowledge of Dr. McGee would be imputed to the plaintiff, permitted—the evidence was brought to the attention of the jury that the company's examiner knew that she had been to the hospital where they have a psychiatric ward when it was not material to the issue. It had nothing to do with the question and answer, and, therefore,

we think that the jury might well have thought, "Well, the company knew about this, and they are just talking about something at the last minute to defeat the claim."

There is one statement in my motion, your Honor, that I wish to withdraw. That is the statement that the knowledge of the insurer's agent acquired outside the scope of his agency is not imputable to the principal. In checking that further, I find that Oregon subscribed, unfortunately, to that majority rule. Therefore, I withdraw [4] that statement as an incorrect statement of the law. However, the testimony was immaterial for the reason I have stated because there was no claim made that the company knew of this condition; therefore, the jury was permitted to have that, and I think that is one of the reasons that perhaps led the jury to feel that, well, the company knew about this anyway, and it is not very important.

Secondly, Dr. Dickel was permitted to testify as to the answers which could have been made to the questions. Now, Dr. Dickel as a psychiatrist and as an expert witness could testify to what in medical language he terms nervousness, nervous breakdown and nervous prostration as one of the terms, and I don't know the others—mental illness or the other, but I think the jury should not have been permitted to hear his testimony as to what answers should have been given because if as a lay person that would have invaded the province of the jury, and your Honor so instructed them, but, as a psychiatrist, how he would answer that certainly was

immaterial and it probably misled the jury into thinking that, well, that is the answer that should have been given anyway.

The third point of our motion where we think that we should have had this before the jury, and the Court excluded our offer of proof of Dr. Dickel when he was here— [5] it was our offer of proof, excuse me—we had supposed that the records of Dr. Coen which were exhibited, were exhibited to them first before I had an opportunity to look at them; nevertheless, while they were records maintained in the course of business, that they were the official records maintained by Dr. Coen when he was here, and I think they should have been received in evidence, your Honor, as part of the Shop Book Rule. However, I will say this, that they were not marked as an exhibit; however, I checked with our Reporter a day or so after the trial, and the record discloses that at the time I offered them into evidence I asked that they be marked.

Now, I think on those three grounds, your Honor, the jury got hold of something that probably led to that result, and I appeal to the discretion of the Court because I think that this was a thin case. It is a case where I do not believe, in just looking at it, you can say this is the meat of the coconut, and you can say that nervousness describes a condition of schizophrenic paranoid, particularly when there is a medical person on the part of the plaintiff, and, certainly, he had some knowledge of those facts so he and Dr. Cooney would know she had been confined to a psychiatric ward. [6]

The Court: Mr. Davis.

Mr. Davis: If your Honor please, I don't want to get into the law of it because I know the Court knows the law.

Of course, it is plaintiff's contention that the Chandler case and the Comer case are not in point. I think the broad field of the law was the notice to the insurance company, and the insurance company had notice of it. There was no concealment of it. The interrogatories submitted to the jury were answered by the jury to that effect, and I believe that those interrogatories were the answers to the jury's findings of facts, and that is the way they found it.

With regard to Dr. McGee, as we advised the Court, we were not coming under a theory of estoppel nor waiver, but the defendant used Dr. Lee who was the doctor for the insurance company, and in his deposition he testified that this woman, so far as he was concerned, in 1954 at the time the answers were filed to the application, she was in bad health, and they would not have covered her. Dr. McGee testified that in his opinion she was in good health when he examined her, that he had knowledge of the condition, but his testimony was that, as far as he was concerned, she was in good health. They submitted the evidence through [7] Dr. Lee that she was not in good health. Now, if she had been in good health is another question for determination. Dr. McGee was the doctor for the insurance company that examined her. The Court gave the right to the defendant to go into his

testimony, and that was the right that the defendant could have exercised on the question of collusion if they wanted to do that.

With regard to Dr. Dickel, your Honor, the question was this: the answer was either mental derangement or nervous prostration. The notice was given to the insurance company of nervous prostration, and Dr. Dickel and the rest of the doctors said that she was not mentally deranged; it was an organic—that if she was mentally deranged it was an organic thing. Dr. Dickel went into it thoroughly. The question was this, was what was the trouble that she had? They marked it nervous prostration. It was up to the insurance company if there was some other thing they should have underlined or something of that nature that came within those two fields. Dr. Dickel's testimony was that she was not mentally deranged; it would come closely to that of nervous prostration, and that is what they did in giving notice to the insurance company.

I know that the Court is familiar with all of the law cases, and I do not want to go into them, but the jury held [8] there was not any false statements wilfully given or any false statements that were given.

The Court: What about Dr. Coan's records?

Mr. Davis: Dr. Coan's records, your Honor, let me say this. Dr. Dickel was called by the defendant as their witness, and he had his records with him at that time. He was put on the witness stand, and I cross examined Dr. Dickel, and then I made him

a witness. The records were those that were maintained, and as I can recall, I am not sure, your Honor, but as I can recall, in making Dr. Dickel my witness I asked him to refer to the records, and Mr. Gearin objected to them, that they were Dr. Coan's records and that they could not be used for the purpose of testimony, and as I recall, the Court sustained the objection, and then it was on cross examination that Mr. Gearin asked Dr. Dickel for the records and looked through them, and then offered them into evidence. The Court at that time asked if I had any objection, and I believe, as I can recall, that I thought they were of no value since they were Dr. Coan's records. Now, I don't think that they were proper, and I know the Court sustained an objection of Mr. Gearin when I asked him to start referring to them.

Mr. Gearin: Your Honor, first of all, three matters I want to cover briefly: one, counsel has said that the [9] testimony of Dr. McGee about going to the question of notice, that was not an issue in the case according to the issues to be determined, and we discussed this matter prior to the trial in Chambers, if your Honor will recall when that—or did the insured, Anna Grace Montgomery, and the plaintiff make misrepresentations of fact to the defendant—the question of notice was not in the case; secondly, the question of good health. If Dr. McGee had testified as to the good health, that was one thing, but the testimony elicited by Dr. McGee went through that, and it went to his notice of his knowledge of her condition which again was not

an issue in the case, and his testimony was not very informative. Thirdly, Dr. Dickel was made a witness of the plaintiff. You will recall that I asked certain questions, and then I stopped, and then we had some colloquy between Counsel and the Court in which we said that to save time let the doctor testify as their witness after he had identified—and then after he had identified the records on cross examination I then made my offer of proof.

The Court: I don't think that the Chandler case is controlling here for the reason that the jury found that the names of the doctors were divulged. You cannot consider [10] the Chandler case in a vacuum. You have got to consider it in the light of these facts.

At the outset, I want to say if I were to decide this case I would have decided it in favor of the defendant but that is why people ask for juries because they may not agree with what I would find.

It seems to me that this case was decided on the theory of the construction of the words used by the company itself. The company had certain words: "Have you ever had a nervous breakdown, nervous prostration, or mental illness," and the words "nervous prostration", I believe, had been underlined, and then it was later explained with the name of the attending physician, and all people seemed to agree that Dr. Cooney was the attending physician. If it was a matter of first impression, I would say that he was not the attending physician because Dr. Coan seems to be the attending physician. He is the one who treated her, but the

defendant's own evidence indicates that Dr. Cooney was the attending physician.

Mr. Gearin objects to the statement, the testimony of Dr. Dickel as to what he would underline. He is a psychiatrist. I would not hold the general public up to the same standard as I would Dr. Dickel, but what the defendant is trying to do is to say that a layman should [11] be brighter than a psychiatrist because a psychiatrist would not have said that that was a mental derangement, and he thinks that the average insured should do so.

With reference to Dr. McGee, it is true that his knowledge was not notice to the company and I denied the admission on that basis, and I told you at the beginning of the trial that I would not let it in on that basis. I think if you had proper pleadings that you might have had a defense to the plaintiff's contentions, but you did not have it in there.

There are two cases that I told you about that would show that if Dr. McGee knew about her condition defendant might not have any difficulty at all. One is Cohn Brothers vs. Northwestern Mutual Life, and the other is Stipeich vs. Metropolitan Life Insurance Company. Both were bases upon a statute in Oregon which say that the agents of life insurance companies are agents for all purposes, but you may not have that provision in the case. But that was not the question that was asked Dr. McGee, and that was not the basis of my ruling. The question is not as posed by Mr. Gearin. The question that was asked Dr. McGee was: did

she tell him that she had been in Holladay Park Hospital, and then the answer came out he did not know whether she [12] told him at that time or whether he knew it from his own information. It was my view at that time, and it is my view now that the plaintiff was entitled to have that testimony before the jury.

If she had told him that she had been to the Holladay Hospital during that examination and he, himself, failed to put it down, that would have been an interpretation which he gave to those questions. Even though it is not admissible on the question of notice, it certainly is admissible on the question of what was divulged to Dr. McGee at the time of the examination. An insured is not responsible if Dr. McGee fails to put down all the information divulged to him, and that was the basis upon which I decided that the testimony of Dr. McGee was admissible.

To clarify, further, he didn't know whether she had told him or whether he had known it from prior information.

Now, with reference to Dr. Coan's records, I thought there was no question about my ruling. You, Mr. Davis, had attempted to have Dr. Dickel use those records. [13] Then I said you cannot have your cake and eat it too; you will either have to let the records in or you cannot have them examined, and I sustained Mr. Gearin's objection to that testimony. Dr. Dickel had testified that he had never made any examination of this woman except on one or two occasions during Dr. Coan's absence

when he came over to the hospital and he looked at her, but these were not Dr. Dickel's records. There was no testimony that they were kept under his direction. They would have been admissible had Dr. Coan had these records and had been asked about them, but they were not.

I think that there is a vital error in the objection because no offer of proof was made as to what would have been proved. I think that you were trying to get in a letter to Dr. Montgomery, but that was because something else happened. I do not know whether it could have been admitted. I don't know how Dr. Coan could have testified that the letter had been mailed to Dr. Montgomery.

This looks like a close case on some of the points, but in view of the jury's findings and in view of my belief that this case does not come within the reach of the Chandler and Comer cases but more properly comes within those other cases, the motions must be denied. There are many cases in the Oregon cases which deal with [14] the interpretation of policies and the interpretation of applications, and I think that this is one of such cases.

For that reason, all of the motions will be denied. [15]

[Endorsed]: Filed March 4, 1958.

Policy Number *.....* -D **SPECIMEN** Amount \$ *.....*
Age 35 Annual Premium \$ *.....*

BANKERS UNION LIFE



INSURANCE COMPANY

DENVER, COLORADO
Old Line Legal Reserve Life Insurance

Hereby Agrees to Pay

..... FIFTEEN THOUSAND AND NO/100 *.....* DOLLARS
(The Ultimate Face Amount of This Policy)

together with any outstanding dividend additions and/or accumulated dividends standing to the credit of this policy, upon receipt of due proof of the death of

..... ANNA GRACE *.....* the Insured, to

JOHN LYLE MONTGOMERY, Husband

..... FIRST BENEFICIARY *.....* Beneficiary.
(SEE AFFILIATION)

with *.....* the right on the part of the Insured to change the Beneficiary in the manner hereinafter provided.

DIVIDENDS

THIS POLICY SHALL PARTICIPATE IN ALL OF THE PROFITS OF THE COMPANY, composed of (1) Savings in Mortality, (2) Interest in Excess of Reserve requirements, (3) Profits from Lapses, and (4) Savings from Economy of Management, as set forth on the second page hereof.

Twenty Payment Life
Profit-Sharing

Accidental Death Benefit Rider
DUPLICATE

DIVIDEND PROVISIONS

ANNUAL DIVIDENDS. At the beginning of the second and each succeeding policy year while this policy is in full force, provided the premium for the current policy year has been paid in full, this policy shall be credited with such share of the profits of the Company as shall be apportioned hereto by the Company. Each such dividend, when available, may, at the option of the Insured, be either:

1. Paid in cash; or
2. Applied to the payment of any premium then due on this policy, provided the balance of the premium for the current policy year be paid in full in cash; or
3. Applied within thirty-one days from the date it becomes available, but not later, as a net single premium computed on the same mortality table and interest assumption as the reserve on this policy, to purchase a paid-up addition to the insurance under this policy (hereinafter referred to as dividend addition); or
4. Left with the Company to accumulate at interest at the rate of two and one-half per cent per annum for each full year, or at such higher rate as the Company may declare on such funds.

If no option is selected, No. 4 will be automatically effective. The selection of a dividend option may be changed by the Insured by written request to the Company at its Home Office, to be effective for dividends thereafter apportioned.

At any time while no premium is in default, the Insured, by written request to the Company at its Home Office, may withdraw the accumulated value of any dividends left with the Company under Option 4, or surrender any Dividend Additions for their full reserve value at the time of such surrender. Any indebtedness against such accumulated dividends or dividend additions will be deducted from the amount payable.

PAID-UP OR ENDOWMENT PRIVILEGE

When the Cash Surrender Value of this policy, which includes the value of any dividend additions and or accumulated dividends to the credit of this policy, shall equal the net single premium for a paid-up endowment policy maturing on the Maturity Date of this policy for the Principal Sum of this policy at the then attained age of the Insured, nearest birthday, computed on the same mortality table and interest assumption as the reserve on this policy, the Company, upon written request of the Insured and release of the dividend additions and accumulated dividends, will endorse this policy as fully paid, subject to any existing indebtedness, whereupon no further payment of premiums will be required; or when such aggregate value equals the Principal Sum of this policy, upon such request and release and surrender of the policy and all dividend additions and accumulated dividends, the Company will pay to the Insured the net cash value as an endowment.

This policy, including the endorsements printed or written hereon or attached hereto by the Company, and the application hereof, a copy of which is attached to and made a part of this policy, constitute the entire contract between the parties. All statements made by the Insured or in his behalf shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall avoid this policy or be used in defense of a claim under it unless it is contained in the written application and a copy of the application is endorsed upon or attached to the policy when issued.

Unless otherwise provided herein or by endorsement hereon, it is understood and agreed that the Insured shall have the right, without the consent of any beneficiary, other than an irrevocable beneficiary, to exercise every right and enjoy every privilege conferred upon the Insured by this policy.

No person, except the President, a Vice-President, the Secretary, an Assistant Secretary or the Treasurer of the Company, has the power to make or modify this contract, or to change or waive any of the provisions hereof, and then only in writing. The company shall not be bound by any promise or representation heretofore or hereafter made by or to any agent or person other than the above.

This policy is based upon the payment of premiums annually in advance, but premiums may be paid in semi-annual or quarterly installments in advance at rates in use by the Company at the date hereof. Premiums are payable at the Home Office of the Company in Denver, Colorado, but may be paid to an authorized collector of the Company but only in exchange for the Company's receipt therefor signed by the President or Secretary and countersigned by such collector. Failure to pay any premium or installment thereof, or premium note or premium extension agreement when due and payable, shall cause this policy to cease and determine, except as may be hereinafter provided, and all payments made hereon shall remain the property of the Company.

If any premium or installment thereof is not paid on or before the day it becomes due, the policyholder is in default; but a grace of thirty-one days, without interest charge, will be allowed for the payment of each premium after the first, during which period the policy will remain in force.

This policy, if not previously surrendered for cash, and if the extended term insurance has not expired, may be reinstated at any time within five years from the due date of any premium or installment in default, upon furnishing evidence of insurability satisfactory to the Company, together with the payment of all premium arrears with interest from the respective due dates thereof at six per cent per annum and the payment or reinstatement, with interest at a like rate, of any other indebtedness to the Company on account of this policy.

This policy shall be incontestable after it has been in force during the lifetime of the Insured for a period of two years from its date of issue (1) except for the non-payment of premiums or installments thereof; (2) except as to the provisions of the policy relating to military or naval service; (3) except that part or parts of the policy, if any, relating to benefits in event of disability; (4) except that part or parts of the policy, if any, relating to additional insurance benefits in event of death by accidental means.

Death while in military or naval service of any country in time of war, declared or undeclared, is a risk not assumed by the Company under this contract, however, this contract may be extended to cover such service upon payment of such extra premiums and such modification of policy contract as may be required by the Company. If death occurs from any cause during such service or within six months after termination of such service from any wounds, injuries or diseases received or contracted during such service, without such extension having been made, the liability of the Company under this policy shall not exceed the total premiums that have been paid to and received by the Company hereon.

If the age of the Insured be misstated, the amount payable under this policy shall be such as the premiums paid hereon would have purchased under this policy at the correct age of the Insured.

In the event of self-destruction during the first two insurance years, whether the Insured be sane or insane, the amount payable under this policy shall be a sum equal to the premiums hereon which have been paid to and received by the Company, and no more.

If this policy does not conform to the laws of the state in which it is issued, it shall be held to be modified to the extent necessary to conform thereto at the effective date hereof; any provisions hereof contrary to such laws shall be construed to be modified or eliminated to the extent necessary, and any further provisions necessary to conform to such laws shall be read into this policy.

At any time during the premium payment period of this policy and while it is in full force and no premium is in default, and before the Insured attains the age of sixty years, it may be exchanged without medical examination for any form of life or endowment policy being issued by the Company at the effective date of this policy and having a higher premium rate and not involving any other life. Such exchange shall be made upon the written request of the Insured and assigns, if any, and any irrevocable beneficiary, and upon the payment to the Company of the difference between the premiums paid hereon and the premiums that would have been paid, if the policy had been originally issued on the new plan, with interest at the rate of six per cent per annum computed on the differences in such premiums, provided the differences in premiums and interest thus produced is not less than the difference between the cash value of the new and the old policies for the number of years premiums were paid on the old policy. If a different form of disability benefit or accidental death benefit from that provided in this policy is requested, evidence of insurability may be required.

The Insured may from time to time change any designated revocable beneficiary hereunder, unless otherwise provided by endorsement on this policy, subject to the terms of any then existing assignment. Every change of beneficiary must be made by written notice to the Company at its Home Office accompanied by the policy for endorsement of the change hereon by the Company, and unless so endorsed the change shall not take effect. After such endorsement the change shall relate back to and take effect as of the date the Insured signed said written notice of change whether the Insured be living at the time of such endorsement or not, but without prejudice to the Company on account of any payment made by it before receipt of such written notice at its Home Office. In the event of the death of any beneficiary before the Insured, the interest of such beneficiary shall vest in the Insured, unless otherwise provided by endorsement hereon.

Any assignment of this policy must be made and sent to the Home Office of the Company in duplicate, one copy to be retained by the Company and one copy to be returned. The Company assumes no responsibility for the validity or sufficiency of any assignment.

This policy is payable at the Home Office of the Company in Denver, Colorado. Before any amount shall be paid hereunder, proof of the interest of claimant must be furnished and any indebtedness to the Company hereon must be settled, including, in the case of a death claim, the amount, if any, necessary to complete the premium for the current policy year.

Loans

At any time after premiums have been paid for the minimum number of years for which Tabular Cash Values are shown in the Table of Guaranteed Values applicable to this policy, and while this policy is in full force, except as extended term insurance, the Company will loan upon the execution of a proper loan agreement and assignment of this policy, and on the sole security thereof, an amount which, together with any existing indebtedness and any unpaid portion of the premium for the current policy year, shall not exceed the Cash Surrender Value of this policy at the end of such policy year; the policy must be delivered to the Company for proper endorsement. Interest shall be at the rate of six per cent per annum, payable in advance to the end of the current policy year and annually in advance thereafter; if interest is not paid when due it shall be added to the principal and bear interest at the same rate. Failure to repay any loan or interest thereon shall not void this policy until the total indebtedness to the Company hereon shall equal or exceed the Cash Surrender Value hereof, but if at any time, such indebtedness, together with accrued interest thereon, shall equal or exceed the then Cash Surrender Value of the policy, the policy shall become void thirty-one days after notice shall have been mailed to the last known address of the Insured and the assignee of record, if any, and of any irrevocable beneficiary.

Automatic Premium Loans

If requested in the application for this policy or if a satisfactory written request is received at the Home Office of the Company while there is no premium or installment of premium in default, or within the grace period allowed for the payment of any premium or installment of premium in default, any premium or installment thereof not paid at the expiration of the grace period shall be automatically charged as a loan against the policy, with interest from the due date of such premium or installment thereof, provided the total indebtedness against the policy will then be within the Cash Surrender Value of the policy. If the Cash Surrender Value is not sufficient to permit the premium or installment thereof then due to be charged as a loan, then the Company will charge as a loan the next smaller installment of premium, either semi-annual or quarterly; provided, however, that if such value is not sufficient to permit a quarterly installment of premium to be charged as a loan, the Company will charge such fraction of a quarterly installment as such value will permit. Automatic Premium Loans will be subject to the same provisions as Policy Loans with respect to rate and manner of payment of interest, failure to repay any loan or to pay interest thereon and voiding of policy. A request for Automatic Premium Loans may be revoked by a satisfactory written notice to the Company at its Home Office, but such revocation shall not affect any Automatic Premium Loan made prior to receipt of such notice of revocation at its Home Office.

Deferral

The Company shall have the right to defer for the period permitted by law but not exceeding six months after request is made for any of the following: policy loans, if for a purpose other than to pay premiums due on policies in the Company; cash surrender value; cash value of paid-up additions; dividend accumulations; or withdrawal of amounts remaining with the Company under settlement options. If payment of the cash value shall be deferred for more than thirty days, interest at the rate of 2½ per cent per annum will be paid by the Company for the period of deferral.

Reserve Basis Net Single Premiums

The reserve on this policy shall be computed on the basis of the Commissioners 1941 Standard Ordinary Table of Mortality, assuming deaths occur at the end of the insurance year, with interest at the rate of 2½ per cent per annum, in accordance with the Commissioners Valuation Method. The net single premiums referred to in this policy shall be computed on the above named table of mortality and interest rate and shall be based on an attained age equal to the insuring age of the Insured at the effective date of this policy, plus the length of time from the effective date to the date as of which the net single premium is computed, the resulting attained age being taken to the nearest year.

Tabular Value

The Tabular Cash Value of this policy per \$1,000 of Ultimate Face Amount, at any time, shall be equal to the then present value per \$1,000 Ultimate Face Amount of the future life insurance benefits guaranteed by this policy, exclusive of any accidental death benefits or any disability benefits which may be included in or attached to this policy, and exclusive of any benefits provided by any rider provisions which may be attached hereto, less the then present value of a life annuity of the annual amount or amounts designated as basic factors at the foot of the Table of Guaranteed Values applicable to this policy and for such period or periods as indicated.

The Tabular Cash Value, if any, on any anniversary prior to the years shown in the Table of Guaranteed Values will be calculated in accordance with the above formula. At any time other than a policy anniversary, the present values referred to shall be the interpolated values as of such date.

Calculation of the present values heretofore referred to shall be made on the basis of the Commissioners 1941 Standard Ordinary Table of Mortality with interest at the rate of 2½ per cent per annum, and on the assumption that deaths occur at the end of an insurance year.

The Tabular Cash Values under this policy are at least equal to or greater than the minimum values prescribed by the statutes of the state in which this policy is delivered and, after three full years' premiums have been paid, are in no event less than the reserve on this policy reduced by two and one-half per cent of the amount of insurance then in force hereunder.

Forfeiture

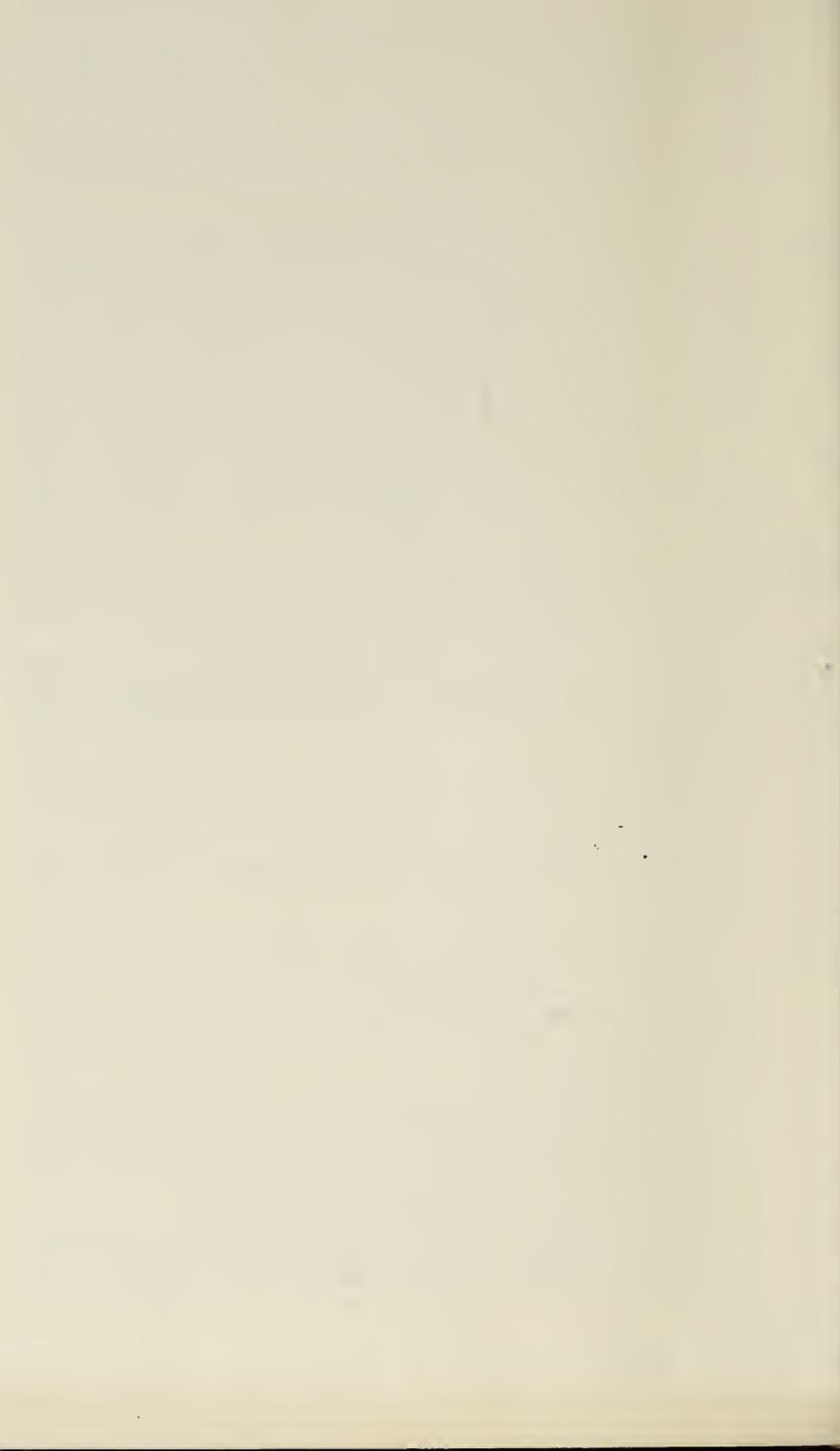
If any premium or installment thereof is not paid at the expiration of the grace period, either in cash or by application of the Automatic Premium Loan provision, the following provisions shall apply:

(a) **Extended Insurance.** Insurance for the then Face Amount of this policy plus any outstanding dividend additions and any outstanding dividends, including dividend accumulations, and less the amount of any indebtedness to the Company hereon, shall, upon the expiration of the grace period, be automatically continued from the due date of the premium or installment thereof in default, as non-participating extended term insurance for such a term as the Cash Surrender Value will purchase as a net single premium at the date of default; provided, however, that if the Cash Surrender Value is sufficient to purchase paid-up participating life insurance in a sum equal to or greater than the amount of term insurance so computed, the Cash Surrender Value shall be so applied.

(b) **Paid-Up Insurance.** Upon proper written request within thirty-one days after such default, but not later, this policy will be endorsed by the Company for such an amount of paid-up participating life insurance, payable at the time and on the conditions provided in this policy, as the Cash Surrender Value will purchase as a net single premium at date of default.

(c) **Cash Surrender Value.** If this policy shall not have been endorsed as provided in (b) above, it may be surrendered to the Company within thirty-one days after such default, but not later, for its Cash Surrender Value, which shall be the Tabular Cash Value of this policy increased by the cash value of any outstanding dividend additions, and any outstanding dividends, including accumulated dividends, and reduced by the amount of any indebtedness to the Company hereon.

Extended Term Insurance or Paid-Up Insurance, provided above, in response to the written request of the Insured, or automatically, will be without any form of Accidental Death or Disability Benefits or any Benefit or Benefits provided in any supplemental agreement attached to this policy. Extended Term Insurance or Paid-Up Insurance may be surrendered upon any anniversary of this policy, or within thirty-one days thereafter, for the net present value thereof as of such anniversary, less any indebtedness to the Company thereon.



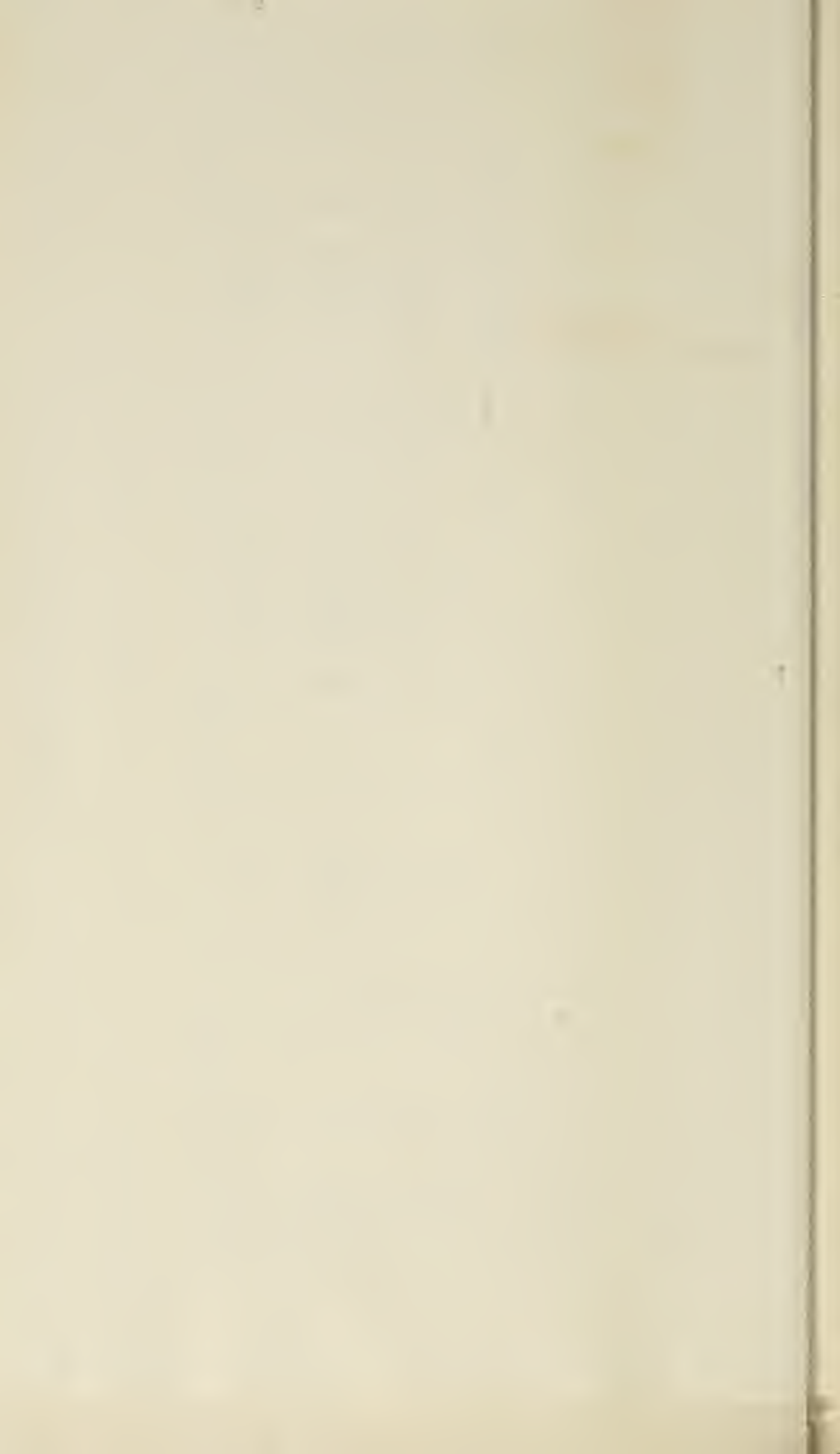
Twenty Payment Life—Tables of Guaranteed Values

The values in these tables are computed in accordance with the provisions of this policy entitled "Basis of Tabular Cash Values" and "Non-Forfeiture," on the basis of \$1,000 of Ultimate Face Amount, assuming that premiums have been duly paid for the number of years stated, that there is no indebtedness to the Company, that there are no outstanding dividend additions nor any outstanding dividends, including dividend accumulations. If the Ultimate Face Amount of this policy is greater or less than \$1,000, the Tabular Cash or Loan Value and the Paid-Up Participating Life Insurance will be increased or decreased proportionately. The term of Extended INSURANCE REMAINS THE SAME FOR ANY Ultimate Face Amount.

The values in the following tables applying to this policy are those shown in the table headed by the age of the Insured at the effective date of this policy as shown on the first page of this policy. Values after twenty years will be furnished upon request.

* * * * *

Age 32		Age 33		Age 34		Age 35	
Basic Face	Factor	Basic Face	Factor	Basic Face	Factor	Basic Face	Factor
16.54	37	17.07	16	17.58	3	18.09	3
44.30	98	45.32	98	46.33	159	47.32	157
101.61	252	103.61	251	105.61	215	107.60	215
131.18	474	133.68	472	136.17	271	138.65	271
161.39	326	164.38	328	167.37	26	170.35	327
192.75	197	195.73	200	198.71	175	201.69	175
225.95	491	228.75	490	231.73	436	234.71	436
		260.43	23	263.41	21	266.39	21
288.85	544	293.87	543	298.87	543	303.86	542
322.49	596	328.02	595	333.04	595	338.02	595
352.08	699	357.95	697	362.97	697	367.94	697
428.11	750	435.27	749	442.41	748	449.51	747
465.01	800	472.75	799	480.46	799	488.17	798
502.85	900	511.18	899	519.57	899	527.88	898
581.57	950	591.59	950	600.79	950	610.37	949
622.61	1000	632.93	1000	643.24	1000	653.56	1000
Basic Face		Basic Face		Basic Face		Basic Face	
Factor		Factor		Factor		Factor	
10 Years		10 Years		10 Years		10 Years	
15 Years		15 Years		15 Years		15 Years	
20 Years		20 Years		20 Years		20 Years	



SPECIMEN
BANKERS UNION LIFE INSURANCE COMPANY
 DENVER, COLORADO

Accidental Death Benefit

Supplemental Agreement attached to and made a part of Policy No. 1214
 on the life of ANNA GRACE MONTGOMERY, the Insured

In the event the death of the Insured results from accidental means, as hereinafter defined, and subject to all the provisions, conditions and restrictions hereinafter contained, the Company will pay the sum of

FIFTEEN THOUSAND AND NO/100THS DOLLARS
 in addition to any other amount payable under said policy.

The additional benefit above provided shall be payable only upon receipt of due proof that the death of the Insured occurs during the premium paying period of the policy and while said policy and this supplemental agreement are in full force and effect on a premium paying basis, before any claim has been made or allowed under any disability benefit included in or attached to said policy, and before any benefit or value (including any amount payable under any other policy) has been received by or for the Insured, or before the anniversary of the policy on which the age of the Insured, nearest birthday, is sixty years, provided such death is not automatically, and before the effective date of this supplemental agreement, and while it is in full force, and caused directly, exclusively and independently of all other cause by external, violent and purely accidental means, as a result of which (except in case of drowning, or internal injuries revealed by an autopsy) the body and soul of the Insured shall result from a wound on the exterior of the body, and provided also that death shall ensue within ninety days from the date of the injury and shall not result from homicide, or from any disease, or from any injury, or from any disease or illness of any kind; physical or mental infirmity; poisoning or infection, other than infection occurring simultaneously with and in consequence of external and bodily injury; inhaling of gas, whether voluntary or otherwise; any violation of law by the Insured; war or any act of war, insurrection or riot; military or naval service; engaging, as a passenger or otherwise, in any kind of marine, submarine, or aeronautical operation.

Failure to pay any premium on said policy or this supplemental agreement, when due and payable, shall automatically terminate this supplemental agreement and all rights hereunder. The provisions contained in said policy and the application thereto, concerning statements and representations by the Insured, modification of contract, payment of premiums, grace for payment of premiums, proof of death, change of beneficiary, assignment, and other provisions of said policy, shall be held in full force and effect, and shall apply hereto except that this supplemental agreement shall not be reinstated unless said policy is in force and no premium is in default thereon, or unless said policy is reinstated at the time of reinstatement of this supplemental agreement.

Upon written request of the Insured on any premium due date and the return of the policy and this supplemental agreement for proper endorsement, the Company will cancel this supplemental agreement. This supplemental agreement shall automatically terminate at the end of the premium paying period, or at the end of the term of the policy, or at the end of the term of the supplemental agreement, whichever is the earlier, or if said policy be surrendered or converted under one of its non-forcible provisions, either automatically or otherwise, or otherwise terminated. Whenever this supplemental agreement shall be cancelled or otherwise terminated, whether upon request of the Insured or in accordance with its terms, the premiums thereafter due under said policy shall be reduced by the amount charged therein for this supplemental agreement, and the amount so reduced shall be paid to and received by the Company as a part of such premium, the amount overpaid will be returned by the Company and the Company shall not incur any other or further liability on account of such payment.

The Annual Premium under said policy includes an Annual Premium of \$ 22.50 for this supplemental agreement; each installment of premium under said policy includes such proportion of the Annual Premium for this supplemental agreement as such installment of premium bears to the Annual Premium under said policy.

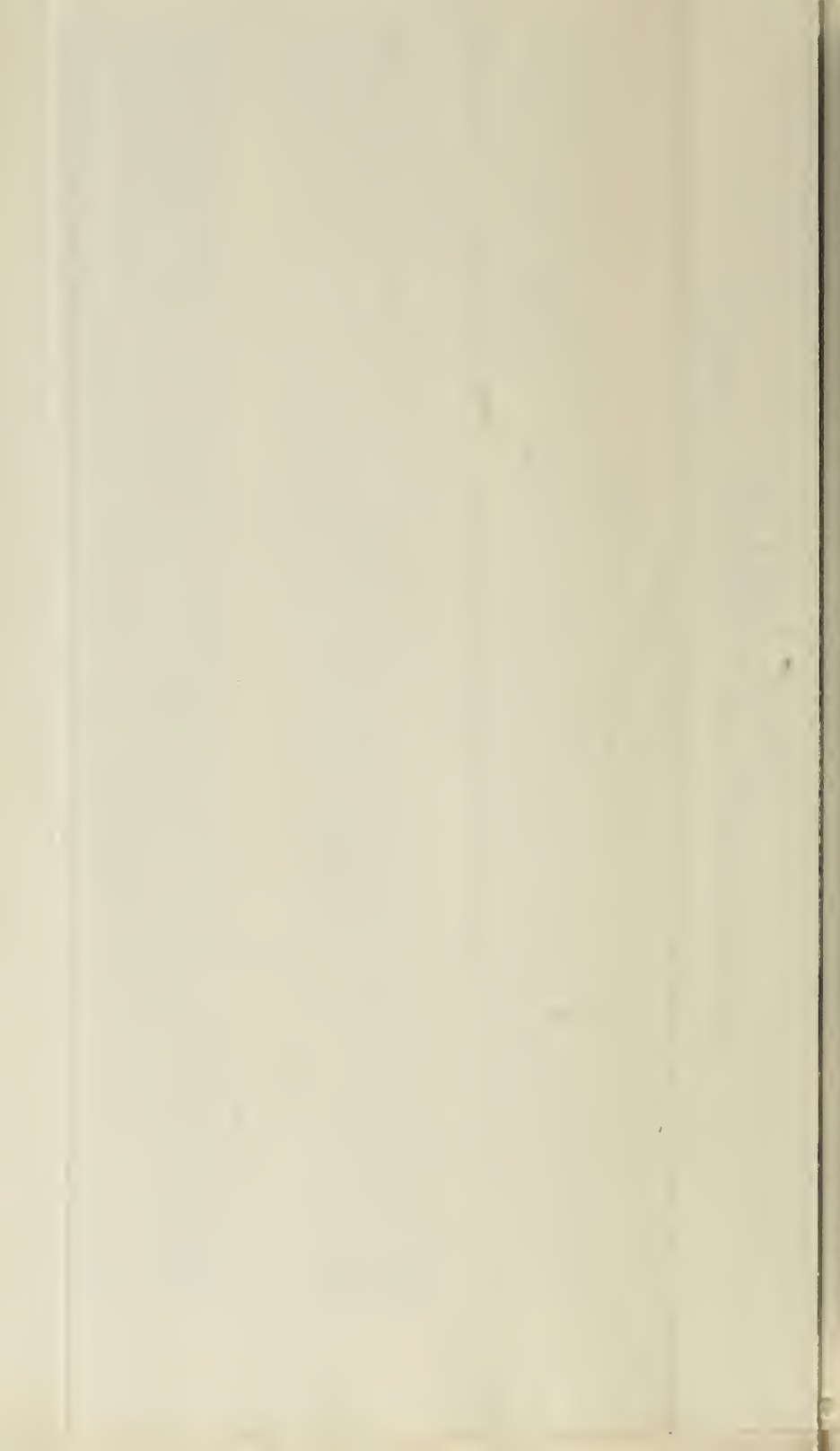
This supplemental agreement is issued in consideration of the statements and representations made in the application hereto, whether included hereof, and the payment of the premiums hereof, which are included in and payable concurrently with the premiums on said policy during the continuance of this supplemental agreement.

In Witness Whereof, the Bankers Union Life Insurance Company has caused this Supplemental Agreement to be executed at its Home Office in Denver, Colorado, this 27TH day of OCTOBER, 1954.

T. O. Mc Cormick
 Secretary

Edw. McCormick
 President

Checked by _____





Declaration made to the Medical Examiner in continuation of and forming part 3 of my application to the

State of **Colorado**, **Denver, Colorado** on **October 18, 1954** at **11:00 AM** and signed by the

1. **What is your full name? PRINT THE NAME PLAINLY.**

MCKERAGUE MARY ELLERY

2. **What is your date of birth.**

1912 Day **DEC** Month **1911** Year

3. **What is your occupation? (Give full details)**

HOUSEWIFE

4. **How long have you been engaged in your present occupation?**

10 YEARS

5. **What was your previous occupation?**

None

6. **Do you ever smoke, inhale any drugs, temporary or permanent, in your occupation? (If so, give full details)**

NO

7. **Do you consume during your residence or traveling outside of the State of Colorado any alcoholic beverages used by you and your family? (If so, give full details)**

NO

8. **Have you ever changed your residence on account of your health?**

NO

9. **Have you ever lived in the same house or room with a tuberculous person? (If so, give full details)**

NO

10. **Are you single, married, widowed, or divorced?**

None

11. **Give aviation activities, past, present or contemplated.**

None

12. **State definitely kind and amount of alcoholic beverages used by you and how frequently.**

Occasionally

13. **If not used, how long have you been a total abstainer?**

NO

14. **Have you at any time used them to excess? (If so, when?)**

NO

15. **Have you ever used opium, cocaine or other drugs, or have you ever taken treatment for the liquor or the narcotic habit? (If so, when?)**

NO

16. **Have you consulted or been treated by a physician during the past two years? State particulars, date and Doctor's name and address.**

NO

17. **Has any life Insurance Company ever examined you without issuing a policy ready as applied for? (If so, State name of Company and give particulars.)**

NO

18. **Are you recipient, or have you ever applied for, a Pension, Government Compensation, or Disability Insurance? (Give full particulars)**

NO

19. **Have you ever suffered from any of the following conditions?**

NO

A. **Brain, Nervous System?**

NO

B. **Heart, Lungs?**

NO

C. **Stomach, Intestines, Liver, Kidneys, Bladder?**

NO

D. **Skin, Middle Ear, Eye, Nose, Throat?**

NO

20. **Have you ever had Gout, Rheumatism, Gonorrhea, Syphilis or Boils?**

NO

21. **Have you ever injured or sprained any part of your body?**

NO

22. **Have you ever undergone any surgical operations?**

NO

23. **Have you consulted or been treated by any physician for any ailment or disease not included in questions 19 and 20?**

NO

THESE QUESTIONS MUST BE ANSWERED FULLY AND WITH SPECIAL CARE. ANSWERS SHOULD BE WRITTEN IN INK. IF YOU HAVE ANY OTHER INFORMATION TO ADD, PLEASE WRITE IT IN THE SPACE PROVIDED.

Age	Sex	Color	Build	Complexion	Height	Weight	Education	Marital Status	Occupation	Address	City	State	Duration	Diagnosis	Special Care
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High School	Married	Housewife	1345 S. W. 1st St.	Denver	CO	10 Years	None	None
74	F	W	Slender	Fair	5' 10"	125	High								



[Endorsed]: No. 15918. United States Court of Appeals for the Ninth Circuit. Bankers Union Life Insurance Company, a corporation, Appellant, vs. John Lyle Montgomery, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: March 5, 1958.

Docketed: March 8, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In The United States Court of Appeals
For The Ninth Circuit

No. 15918

BANKERS UNION LIFE INSURANCE COM-
PANY, a corporation, Appellant,

vs.

JOHN LYLE MONTGOMERY,

Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

Appellant adopts as its Statement of Points on Which it Intends to Rely its Points on Which Appellant Intends to Rely filed in the District Court

and transmitted to this Court as a part of the record on appeal herein.

KOERNER, YOUNG, McCOLLOCH,
& DEZENDORF,
/s/ JOHN GORDON GEARIN,
/s/ JAMES H. CLARKE,
Attorneys for Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 8, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

APPLICATION TO BE RELIEVED FROM
PRINTING AND REPRODUCING CER-
TAIN EXHIBITS

Appellant respectfully requests this Court to relieve it from the obligation of printing or reproducing any of the exhibits introduced in evidence during the trial of the above entitled matter with the exception of exhibits numbered 1, 2a and 3a and further requests that this Court consent to consider all other exhibits offered and received in evidence and all exhibits offered but not received in evidence in their original form as transmitted to this Court by the District Court.

Appellant further requests that this Court permit the above described exhibits 1, 2a and 3a to be printed by photostatic process and further that the Court consent to consider said exhibits 1, 2a and 3a in photostatic form.

This request is based upon the fact that the remaining exhibit offered and received in evidence and exhibits offered but not received in evidence are bulky and not readily printable because they consist of hospital records, X-ray photographs and other papers which would be difficult and expensive to reproduce. In the opinion of appellant, the determination of the appeal herein will depend primarily upon the testimony and exhibits 1, 2a and 3a.

KOERNER, YOUNG, McCOLLOCH,
& DEZENDORF,

/s/ JOHN GORDON GEARIN,

/s/ JAMES H. CLARKE,

Attorneys for Appellant.

[Title of Court of Appeals and Cause.]

AFFIDAVIT

State of Oregon,

County of Multnomah—ss.

I, James H. Clarke, being first duly sworn, depose and say:

I am one of the attorneys for the appellant above named;

That the exhibits offered and received in evidence during the trial of this case (other than those numbered 1, 2a and 3a, and exhibits offered but not received in evidence during the trial of this case are bulky and not readily printable, because they consist of hospital records, X-ray photographs and

other papers which would be difficult and expensive to reproduce; in my opinion the determination of the appeal herein will depend primarily upon the testimony and exhibits 1, 2a and 3a.

/s/ JAMES H. CLARKE.

Subscribed and sworn to before me this 6th day of March, 1958.

[Seal] /s/ V. M. KEPPEL,
Notary Public for Oregon. My Commission Expires Aug. 31, 1959.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 8, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF ALL THE RECORD MATERIAL TO CONSIDERATION OF THE APPEAL

Appellant designates as all the record material to consideration of the appeal and to be printed herein:

All portions of the record contained in appellant's Designation of Portions of the Record to be Contained in the Record on Appeal and in appellant's Supplemental Designation of Portions of the Record to be Contained in the Record on Appeal filed in the District Court, with the following modifications:

1. Items 8 and 19 of appellant's said Designation, which apparently do not exist as separate items in the files and records of the District Court and for want thereof have not been separately identified and transmitted to this Court by the Clerk of the District Court, need not be printed.

2. With respect to Item 13 of appellant's said Designation, appellant requests that Exhibits 1, 2a and 3a, being the subject policy of insurance and the two parts of the application therefor, be printed, and, to save expense, that this be done by photostatic copy. The remaining exhibits offered and received in evidence need not be printed.

3. With respect to Item 12, appellant designates all of the same to be printed, this being specifically defined to include:

- a) the transcript of testimony;
- b) proceedings upon the return of the jury's verdict;
- c) proceedings upon the argument of appellant's motion for judgment n.o.v.

4. Item 14 need not be printed.

5. In addition, appellant specifically designates for printing:

- a) The Statement of Points on Which Appellant Intends to Rely, filed herewith in this Court;

b) This designation.

KOERNER, YOUNG, McCOLLOCH,
& DEZENDORF,
/s/ JOHN GORDON GEARIN,
/s/ JAMES H. CLARKE,
Attorneys for Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 8, 1958. Paul P.
O'Brien, Clerk.